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In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and JAMES T. McINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, PETITIONERS

v.

SIERRA CLUB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the Director of the Office of Management and Budget, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-48a) is not yet reported. The opinion of the dis-

trict court (App. B, *infra*, 49a-58a) is reported at 395 F. Supp. 1187.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether annual budget requests by federal agencies to the Office of Management and Budget and recommendations by OMB to the President, concerning items to be included in the President's Budget for previously enacted federal programs affecting the environment, constitute "proposals for legislation" significantly affecting the quality of the human environment so as to require preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

2. Whether Section 102(2)(B) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(B), imposes judicially enforceable obligations on the Office of Management and Budget to adopt procedures and regulations to identify agency budget requests that must be accompanied by environmental impact statements.

STATUTES INVOLVED

1. Budget and Accounting Act, 1921

Sections 2, 201(a)(5), 207, 215, and 216(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 2, 11(a)(5), 16, 23, 24(a), provide in part:

SEC. 2. When used in this Act—

The terms "department and establishment" and "department or establishment" mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including any independent regulatory commission or board and the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States; * * * *.

SEC. 201. (a) The President shall transmit to Congress during the first fifteen days of each regular session, the Budget * * *. The Budget shall set forth in such form and detail as the President may determine—

* * * * *

(5) estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year, and projections for the four fiscal years immediately following the ensuing fiscal year * * *.

* * * * *

SEC. 207. * * * The Office [of Management and Budget [1]], under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments.

SEC. 215. The head of each department and establishment shall submit his requests for appropriations to the Office of Management and Budget on or before a date which the President shall determine. In case of his failure to do so, the President shall cause such requests to be prepared as are necessary to enable him to include such requests with the Budget in respect to the work of such department or establishment.

SEC. 216. (a) Requests for regular, supplemental, or deficiency appropriations which are submitted to the Office of Management and Budget by the head of any department or establishment shall be prepared and submitted as the President may determine in accordance with the provisions of section 201.

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[1] Since July 1, 1970, the budget preparation functions described in Section 207 of the Act and formerly performed by the Bureau of the Budget have been performed by the Director of the Office of Management and Budget. Under Section 101 of the Reorganization Plan No. 2 of 1970, 84 Stat. 2085, "all functions vested by law" in the Bureau of the Budget or its Director were transferred to the President. The President thereupon delegated these functions to the Director of the Office of Management and Budget within the Executive Office of the President. Executive Order No. 11541, 35 Fed. Reg. 10737 (1970).

2. National Environmental Policy Act of 1969

Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, provides in part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement by the responsible official * * *.

STATEMENT

1. In July 1974, the Sierra Club, the National Parks and Conservation Association, and the Natural Resources Defense Council ("respondents") initiated this action against the Secretary of the Interior and the Director of the Office of Management and Budget (OMB). Respondents are environmental organizations with a combined membership of approximately 200,000. They alleged that many of their members use the National Wildlife Refuge System (the Sys-

tem), a network of more than 350 wildlife refuge areas, encompassing more than 30 million acres, that is administered by the Fish and Wildlife Service of the Department of the Interior.[2] Respondents alleged that their members are adversely affected in their use of the System by the environmental impact of proposals made by Interior and by OMB concerning the operation and maintenance of the System.

Respondents claimed that when Interior submits its annual budget request for the System to OMB, and when OMB in turn recommends an annual level of funding for the System for the President to include in the Budget he submits to Congress, these communications are "recommendation[s] or report[s] on proposals for legislation * * * significantly affecting the quality of the human environment * * *" under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Therefore, respondents alleged, these budget communications must be accompanied by an environmental impact statement (EIS) as provided in that Section. Respondents alleged that no such environmental impact statements were prepared, and they sought a declaratory judgment directing Interior and OMB to prepare, consider, and disseminate an environmental impact statement in connection with each annual budget recommendation or request for the Wildlife Refuge System. They also sought a declaration that, under Section 102(2)(B) of NEPA, 42 U.S.C. 4332

[2] The Refuge System is organized under the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd *et seq.*

(2)(B), OMB must establish formal methods and procedures to identify those submissions made by federal agencies during the budget process that must be accompanied by environmental impact statements.[3]

In their answer to the complaint, OMB and Interior admitted that they had not prepared an environmental impact statement for any annual budget request they had made for the Refuge System. They maintained that Section 102(2)(C) of NEPA does not require agencies to prepare environmental impact statements in connection with annual budget requests or recommendations. They submitted affidavits describing the numerous steps involved in the preparation of the President's annual Budget insofar as it relates to the Refuge System, the time constraints imposed by a process that must be repeated annually, the need for confidentiality, and the other conditions under which budget decisions are made within the Executive Branch.[4] In the view of OMB and Interior, these facts demonstrated that it not only would be impractical, but inconsistent with the nature and process of executive decision-making, to impose the

[3] An additional claim in the complaint was that Interior and OMB, without public notice, had made "major policy decisions" to cut back, curtail, and underfinance the operations of the Refuge System. Interior was accused of violating NEPA because it had failed to prepare an environmental impact statement to accompany its alleged adoption of this policy. Interior and OMB denied that such a policy had been adopted. The district court made no finding or ruling as to whether such a policy had been adopted.

[4] The affidavits are set forth as Appendices E and F, *infra*, 63a-78a.

requirement of environmental impact statements on the budget preparation process.

2. The district court granted summary judgment for respondents. The district court held that agency budget requests are "proposals for legislation" within the meaning of Section 102(2)(C) of NEPA, and that OMB and Interior must therefore prepare, consider, and disseminate an environmental impact statement on every annual request or recommendation they make for funding the environmentally-significant Refuge System (App. D, *infra*, 61a). The court found support for its conclusion in the congressional objective of ensuring executive consideration of environmental values during the "constant revision and reevaluation of ongoing projects" (App. B, *infra*, 50a, quoting *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181 (6th Cir. 1972)).[5] The court stated

[5] The court further relied (App. B, *infra*, 50a-52a) on guidelines adopted by the Council on Environmental Quality (CEQ) providing that agencies are to prepare environmental impact statements on "[r]ecommendations or favorable reports relating to legislation including requests for appropriations." 40 C.F.R. 1500.5 (1977). The court of appeals also gave weight to the CEQ guidelines (App. A, *infra*, 6a n.8), though Judge MacKinnon in dissent stated that they were ambiguous and viewed them as not inconsistent with his interpretation of the Act (*id.* at 34a n.9, 41a & n.11). In any event, since the decision of the court of appeals, CEQ has proposed to adopt regulations to amend this portion of its guidelines to provide that " '[l]egislation' * * * does not include requests for appropriations." 43 Fed. Reg. 25244, 25245 (1978). (A footnote states, *id.* at n.1, that CEQ "in consultation with OMB had been prepared to propose this wording" before the decision of the court of appeals in this case, and invites "comment on the implications of that case" for the proposal.)

that since EIS preparation can begin before the budget request is made, "it is irrelevant that final budget decisions are presently made in a very short time frame" (App. B, *infra*, 54a). The court said the effect of its decision would be limited because (*id.* at 55a) "[a]ppropriation proposals for most federal agencies would not appear to pose a threat to the environment and therefore no impact statement would be required." The court rejected the government's claim of confidentiality for appropriation requests, and accordingly found no bar to requiring publicly-disseminated environmental impact statements to accompany those requests (*id.* at 55a-57a). Finally, without discussion, the court held that Section 102(2)(B) of NEPA requires OMB "to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated" (App. D, *infra*, 62a).

3. On appeal, the District of Columbia Circuit first addressed the question of standing. The respondent organizations had submitted no affidavits or other evidence to support their allegations that their members used the Refuge System and were adversely affected by the environmental impact of budgetary requests concerning the System (App. A, *infra*, 8a).[6]

[6] Respondents also claimed standing on the basis of their organizational interests in obtaining, evaluating, and disseminating the budgetary information concerning the Refuge System which they asserted that NEPA required the agencies to compile and disclose (App. A, *infra* 9a n.16). The court of appeals found it unnecessary to pursue this theory (*ibid.*).

The court noted, however, that the government had not specifically contested respondents' allegations (*id.* at 9a). The court reasoned that since respondents could almost certainly show that at least some of their members use the Refuge System, they could satisfy the "minimal" standing requirements of *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972) (App. A, *infra*, 8a). Hence the government's "general denial" of standing did not require that a trial be held to resolve the issue (*id.* at 9a). The court added, however, that if a genuine issue of fact was raised concerning the use of the wildlife refuges by respondents' members, the government could contest the issue in appropriate proceedings on remand (*ibid.*).[7]

On the merits, the court of appeals agreed with the district court that Congress intended the EIS requirement of Section 102(2)(C) to apply to the budget preparation process (*id.* at 10a-14a). The court of appeals concluded, however, that application of the EIS requirement to "every budget request for the annual operation * * * of an agency whose activities may have significant environmental impact" would "trivialize NEPA" (*id.* at 14a, 17a).[8] In order

[7] Judge MacKinnon stated in dissent that respondents should be required to demonstrate not only that their members use the wildlife refuges, but also that there is "a causal connection between the proposed appropriation [under consideration by Interior or OMB] and some identifiable decline in one of [their] members' use of a wildlife refuge" (App. A, *infra*, 27a).

[8] Despite the district court's suggestion that its ruling would have only a limited effect, the court of appeals noted that the phrase "significantly affecting the quality of the human environment" in Section 102(2)(C) has received a broad application and could apply, for example, to activities of the ICC and the SEC (App. A, *infra*, 14a n.27) (citing *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320-321, 322-327 (1975), and *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689 (D. D.C. 1974).

to provide "a limiting principle" (*id.* at 15a), the court concluded that the Act's reference to "proposals for legislation" should be understood to encompass proposals for "taking new action which significantly changes the status quo, not * * * a routine request for budget approval and appropriations for continuance and management of an ongoing program" (*id.* at 17a). In addition, even where there is no proposal to change the status quo, the EIS requirement would apply

> to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. * * * Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review.

App. A, *infra*, 17a & n.32. The court summarized its holding by stating that "an EIS is required when such a new look is had. * * * It is impossible to have a 'new look' at everything all the time. When there is such a new look the ensuing request for appropriations is a 'proposal for legislation' under NEPA." *Id.* at 18a.

Applying this "new look" principle to this case, the court observed that, subsequent to the decision of the district court, the Department of the Interior, in the exercise of its discretion, had completed a "programmatic EIS" for the Refuge System (*id.* at 18a).[9] The adequacy of this EIS as a long term analysis that evaluates the environmental consequences of the proposed and alternative levels of funding for the System over the next decade was not challenged by respondents (*id.* at 19a).[10] The court accordingly held that "there is no further obligation under NEPA at this time" with respect to budget requests for the Wildlife Refuge System (*id.* at 23a), and it reversed the portion of the district court's judgment that directed Interior and OMB to prepare an EIS on each annual budget request for the System (*id.* at 19a).

The court of appeals affirmed, however, the portion of the district court's order that directed OMB to develop formal methods and procedures to identify those agency actions that require environmental statements (*id.* at 20a-23a). The court held that NEPA requires OMB, "as the key agency in the executive's budget formulation process, to give appropriate guidance to the agencies" (*id.* at 20a). It indicated that such guidance was particularly important in view of

[9] The draft environmental statement was issued in November 1975 (40 Fed. Reg. 54451, 55376, 55378) and the final EIS, entitled *Final Environmental Statement: Operation of the National Wildlife Refuge System,* in November 1976. 41 Fed. Reg. 53129.

[10] The agency indicated that it intended to update the programmatic EIS in the future to give account to altered plans or circumstances. App. A, *infra,* 18a.

the court's holding that some but not all budget requests constitute "proposals for legislation" under the Act (*id.* at 19a-20a). OMB was thus directed "to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process when it culminates in proposals for legislation under the principles previously discussed" (*id.* at 21a).

Judge MacKinnon dissented from the principal holdings of the court. He noted that under this Court's decisions in *Kleppe* v. *Sierra Club,* 427 U.S. 390, 404 (1976), and *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289, 320 (1975), as well as the language of the Act, the EIS requirement of Section 102(2)(C) becomes applicable only when a final "proposal" for federal action is made (App. A, *infra,* 28a-30a). Since "in the budget-making process there is no final proposal until the President includes the item in his budget to Congress" (*id.* at 29a), the prior requests, recommendations, discussions, and negotiations concerning agency budget items within the Executive Branch are not sufficiently final to be subject to the EIS requirement. This conclusion is reinforced, Judge MacKinnon argued, by the confidentiality of the federal Budget until it is released by the President. Preparation and publication of environmental studies on budget requests would interfere, in particular, with "the confidential nature of the communications between the President and units within the Executive Office" (*id.* at 45a).

Moreover, even if budget requests were "proposals" under the Act. they still would not be "proposals for

legislation," Judge MacKinnon argued. Congress has traditionally distinguished between "legislation" and "appropriations," and there is no reason to think that it departed from its customary usage here (*id.* at 31a-41a). Thus, agreeing with the majority that "it would be absurd to construe [NEPA] and its implementing regulations to require an EIS with each annual budget request," Judge MacKinnon found it "even more absurd—and equally contrary to the language of the statute—" to construe it to require the agency "to produce the half-way measure of a 'programmatic' environmental statement" (*id.* at 48a).

Finally, Judge MacKinnon disagreed with the majority's conclusion that Section 102(2)(B) imposes any duty on OMB to issue guidelines to federal agencies concerning their obligations, as declared by the majority, to prepare and publish environmental impact statements in connection with budget requests. To the extent that regulations governing environmental studies are required of agencies under the Act, Judge MacKinnon found nothing to suggest that regulations adopted by agencies for their own use, such as those of the Department of the Interior, are not sufficient. *Id.* at 46a-47a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that annual budget submissions made by federal agencies to OMB and by OMB to the President for programs affecting the environment constitute "proposals for legislation" that must be accompanied by environmental impact

statements under NEPA, though the court limited its holding to submissions that would "significantly change[] the status quo" or that reflect an agency's "new look" at a program. This holding marks the first significant judicial intervention in the processes of the Executive Branch that culminate in the President's annual submission of his Budget to Congress.[11]

The decision is exceptional in its willingness to infer, in the face of substantial contrary evidence, a congressional intent to interpose procedural obstacles to the free communication of information, recommendations, and policy choices concerning budget decisions for which the President is responsible. Given the time constraints, the need for political flexibility,[12]

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[11] We know of two other decisions applying NEPA to the budgetary process. In *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181-1182 (6th Cir. 1972), it was held that the agency was required to prepare an environmental impact statement on its requested appropriations to complete a construction project. In *Aluli* v. *Brown*, 437 F.Supp. 602 (D. Haw. 1977), appeal pending, a district court required the Navy to prepare an environmental impact statement on its use of a target range on Kahoolawe Island, Hawaii, in connection with each annual budget request by the Department of Defense that contains funds to finance such use. Other courts have refused to impose procedural conditions or reporting or disclosure requirements on the budget-making process. *Sierra Club* v. *Department of the Interior*, 424 F. Supp. 172, 175 (N.D. Cal. 1976); *National Wildlife Federation* v. *United States*, Civil No. 78-1039 (D. D.C. July 20, 1978), appeal pending. See also *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973); *Harrington* v. *Bush*, 553 F.2d 190, 194-195 (D.C. Cir. 1977).

[12] See A. Wildavsky, *The Politics of the Budget Process* (1964).

the tradition of confidentiality, and the other conditions that characterize the budget-making process, the decision casts doubt on the continued ability of the executive to conduct the process effectively. In holding that budget submissions are subject to judicial review under NEPA, and that a vaguely defined class of them must be accompanied by environmental impact statements, the court has established an amorphous right of public intervention in the preliminary stages of executive policy formulation. Additional litigation seeking to define and enlarge this right can be expected.

None of these results is warranted. In reaching its decision the court of appeals has failed to conform to the intention of Congress and to decisions of this Court that articulate a narrower scope for NEPA's requirement of environmental impact statements.

1. In holding that budget requests by federal agencies to OMB [13] and by OMB to the President constitute

[13] Although the declaratory judgment of the district court that the Secretary of the Interior must prepare impact statements in connection with budget requests for the Refuge System was reversed because of the EIS that the Secretary voluntarily prepared (see page 12, *supra*), the Secretary retains a litigable interest in this case. The decision of the court of appeals, unless reversed, will require the Secretary to prepare additional impact statements in connection with budget requests involving a "new look" at either the Refuge System or other Departmental programs. Moreover, the portion of the judgment that requires OMB to issue guidelines directing other agencies (including Interior) to prepare impact statements in connection with "new look" budget requests (see pages 12-13, *supra*) constitutes an indirect imposition of this requirement on the Secretary.

"proposals" for legislation under Section 102(2)(C), the decision of the court of appeals conflicts with decisions of this Court. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976), the Court held that Section 102(2)(C) gives a court "no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal" at which an impact statement must be prepared. Instead, "the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 320 (1975) (*SCRAP II*) (emphasis in original).'" 427 U.S. at 406.

Only the President is empowered to submit the Budget to Congress. He is required to do so by statute (31 U.S.C. 11),[14] and he does so also in the exercise of his constitutional responsibility to recommend to Congress "such Measures as he shall judge necessary and expedient" (Article II, Section 3). Thus, even assuming that congressional appropriations constitute "legislation" under NEPA (but see Point 2, *infra*), it is not until the President has submitted the Budget to Congress that any such legislation has been "proposed." Agency budget requests to OMB are pre-decisional, and so are OMB's recommenda-

[14] "The President shall transmit to Congress during the first fifteen days of each regular session, the Budget, * * *." 31 U.S.C. 11(a).

tions to the President.[15] The requests, recommendations, discussions, and negotiations on the budget within the Executive Branch constitute the "germination process" of the President's Budget proposals. See *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.[16]

The conclusion that executive communications on the budget are not "proposals" under NEPA is consistent with Congress's own understanding of the budget-making process. The Budget and Accounting Act (31 U.S.C. 1 *et seq.*), which governs that process, was enacted in 1921, a half-century before NEPA. When NEPA was adopted, Congress was well acquainted not only with the intricacies and constraints of the budget-making process in general, but specifically with the longstanding practice that

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[15] In preparing the Budget, OMB operates as a unit "in the Executive Office of the President," and "under such rules and regulations as the President may prescribe." 31 U.S.C. 16. See also note 1, *supra*.

[16] The court of appeals attempted to distinguish this case from *Kleppe* by stating that *Kleppe* "was based on the finding that there was no program to analyze," whereas here the Refuge System is a federal program (App. A, *infra*, 16a n.29). But the court, in quoting from one portion of the opinion in *Kleppe* (427 U.S. at 400-401), disregarded the subsequent portion of the opinion (*id.* at 404-406) in which this Court assumed "that a regional program was contemplated" (*id.* at 404) and held that the court of appeals had nonetheless erred in requiring that an EIS be prepared "at some point prior to the formal recommendation or report on a proposal" (*id.* at 404). The Court noted that "the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action * * *" (*id.* at 406).

agency budget requests remain confidential until the President transmits the Budget to Congress. Indeed, in Section 206 of the Budget and Accounting Act, 31 U.S.C. 15, Congress has prohibited the disclosure to Congress or to congressional committees of an agency's appropriations request that has not been approved by the President, "unless at the request of either House of Congress." Congress has altered this practice only with respect to two specific agencies.[17] Also, Congress has long been aware of executive policy mandating the confidentiality of budget communications within the Executive Branch.[18] It has

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[17] The Consumer Product Safety Commission and the Commodity Futures Trading Commission are required to submit their appropriations requests to Congress at the same time that they submit them to OMB and the President. Consumer Product Safety Act, Section 27(k)(1), 15 U.S.C. 2076(k)(1); Commodity Futures Trading Commission Act of 1974, Section 101(3), 7 U.S.C. 4a(h)(1).

[18] Paragraph 3 of OMB Circular A-10 (revised Nov. 12, 1976) states:

> *Requirements for confidentiality prior to official transmittal.* The confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. Presidential budget decisions are not final until the budget itself is transmitted to Congress. Amendments to the budget and supplemental appropriation requests may also follow the transmittal of the budget. Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head

taken no action to challenge that policy (except with respect to two agencies, see note 17, *supra*), and has not suggested application of an EIS requirement to budget requests.

It is therefore most unlikely that Congress in enacting NEPA intended to require that environmental impact statements accompany budget requests within the Executive Branch. To interject published commentary into what has been and remains a confidential process would have been a conspicuous departure from existing budgetary practices. Nothing in the history of the Act suggests that Congress contemplated such a result.[19]

2. Even if budget submissions by federal agencies and OMB were "proposals" under Section 102(2)(C), they would not be "proposals for legislation." As Judge MacKinnon explained in his dissent (App. A, *infra*, 30a-41a), Congress has traditionally distinguished between "legislation" and "appropriations."

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of each agency is responsible for preventing premature disclosures of this budgetary information.

A prior, similar version of Circular A-10, revised Jan. 18, 1964, is quoted in the dissenting opinion of Judge MacKinnon (App. A, *infra*, 44a).

[19] Indeed, constitutional questions might be posed by congressional requirements that executive agencies and OMB expand the contents of budgetary materials they send the President by including environmental impact statements and that they make those statements public. The President has authority to receive information from departments and agencies, and from advisers within his Executive Office, free from congressional and judicial regulation. See, *e.g.*, Article II, Section 2, Clause 1 of the Constitution.

Legislation is the making of substantive rules, including the authorizing of new programs; appropriation is the funding of previously authorized programs. Thus, under the Rules of the House, "Language in [a general] appropriation bill changing existing law is legislation and not in order." Rule XXI, Clause 2, as stated in *Deschler's Procedure* 295 (1974); see also 4 *Hinds' Precedents* §§ 3811-3812 (1907); Standing Rules of the Senate, Rule 16.4; *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 35-36.

Congress has frequently been confronted with the contrast between legislation and appropriations in its procedural rulings and has maintained a sharp distinction in the proper usage of those terms. See, *e.g.*, 7 *Cannon's Precedents* §§ 1172, 1410, 1443, 1445, 1448, 1454, 1459, 1463, 1471, 1472 (1941). Congress has also made the distinction in numerous statutes that refer separately to "legislation" and "appropriation." *E.g.*, 18 U.S.C. 1913 (proscribing the use of appropriated funds to influence any congressman to favor or oppose "any legislation or appropriation"); 22 U.S.C. 2394(c); 42 U.S.C. (1970 ed. & Supp. V) 2996e(c)(2)(B). As this Court stated recently in *TVA* v. *Hill*, *supra*, slip op. 35: "We recognize that both substantive enactments and appropriations measures are 'acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs." Since the distinction is so deeply ingrained in congressional usage, it is reasonable to infer that when Congress in Section 102

(2)(C) used the word "legislation" with reference to its own activity, it intended to convey the same meaning that it customarily gives the term.

Application of this traditional distinction in the context of Section 102(2)(C) yields a reasonable statutory scheme. An environmental impact statement is required with respect to every proposal for new substantive "legislation," such as the institution of a new program, and an EIS is also required whenever specific actions implementing such legislation will constitute "major Federal actions significantly affecting the quality of the human environment * * *." 42 U.S.C. 4332(2)(C). Construing Section 102(2)(C) to apply to "legislation," but not to "appropriations," removes only the requirement of an additional and probably unnecessary EIS review at the intermediate stage when annual budget requests to finance previously enacted legislation are formulated.

In contrast, to consider every budget request a "proposal for legislation" would, as the court of appeals recognized, "trivialize NEPA" and reach "ridiculous extremes" (App. A, *infra*, 17a, 22a-23a). Yet the "new look" doctrine devised by the court in order to provide "a limiting principle" is no easier to defend. It has no foundation in the statutory language, but rests instead on "a balancing of court-devised factors" very comparable to the approach this Court rejected in *Kleppe*, *supra*, 427 U.S. at 406. The court of appeals' analysis provides sparse guidance to enable agencies and OMB to determine when a budget

request involves a "new look," or "ushers in a considered programmatic course following a programmatic review" (App. A, *infra*, 17a). The court's decision "would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation." *Kleppe*, *supra*, 427 U.S. at 406. The "limiting principle" that Congress itself employed in Section 102(2)(C) was to create an EIS requirement for "legislation" but not for "appropriations." [20]

3. The court of appeals concluded that Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), imposes a duty on OMB "to develop methods and procedures to implement the NEPA obligation to provide environmental impact statements to accompany those proposals on budget and appropriations that are proposals for legislation" (App. A, *infra*, 23a). For

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[20] Although the question is not presented here, nothing in NEPA would require the President to submit an EIS to Congress at the time the Budget is transmitted. The Budget is "proposed" at that time, but the proposal is not for "legislation." In addition, Section 102(2) applies only to "agencies of the Federal Government," and the President is not an "agency." Most important, any construction of NEPA that sought to impose judicially enforceable limitations on the President's authority and ability to communicate budget requests to Congress would risk "breaching the separation of powers doctrine, and potentially infringing upon the President's constitutional power to present recommendations for legislation to the Congress." *Chamber of Commerce* v. *Department of Interior*, 439 F.Supp. 762, 767 (D. D.C. 1977); see *Wingfield* v. *OMB*, 9 E.R.C. 1961, 1963 (D. D.C. 1977).

the reasons set forth above, we submit that budget requests by executive agencies are not "proposals for legislation" under Section 102(2)(C) of NEPA and that neither OMB nor any other agency is thus required to prepare an EIS in connection with budget submissions. It follows that, contrary to the court's holding, NEPA imposes no duty on OMB to advise other agencies concerning their EIS responsibilities in the budget process.

But even if we assume that Section 102(2)(C) requires agencies to prepare impact statements in connection with "some but not all" budget requests (App. A, *infra*, 19a-20a), the court of appeals erred in concluding that Section 102(2)(B) imposes a judicially enforceable obligation on OMB to promulgate EIS guidelines for other agencies. Section 102(2)(B) provides that all federal agencies are to

> identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.

Assuming that this generalized language is judicially enforceable at all, it does not direct OMB to adopt procedures to guide other agencies concerning the independent responsibilities they may have under Section 102(2)(C) to prepare environmental impact statements. Instead, Section 102(2)(C) itself provides that the EIS is to be prepared "by the responsible official" for the agency that makes a "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." Thus, as Judge MacKinnon concluded in his dissent (App. A, *infra*, 46a-47a), it is the Department of the Interior, not OMB, that is responsible for determining when an EIS should be prepared in connection with that Department's "proposals for legislation." The court's judgment represents an unwarranted interference not only with the internal allocation of responsibilities by the Executive Branch, but also with the allocation of EIS responsibility by NEPA itself.

Moreover, respondents lack standing to raise any claim under Section 102(2)(B). The court of appeals did not consider separately the questions whether respondents have standing to sue under Section 102(2)(C) and Section 102(2)(B). The court concluded generally that if respondents' members use wildlife refuge areas that are adversely affected by spending decisions for the Refuge System, they have standing in this case (App. A, *infra*, 8a). We concede that members of the respondent organizations use wildlife refuge areas and that their use may be adversely affected by the environmental impact of decisions reducing the funds available for operation and maintenance of the Refuge System. Furthermore, when an agency fails to prepare an EIS that is required by Section 102(2)(C), and this failure leads to a governmental decision adverse to the

environmental interests that NEPA is designed to protect, it would appear that the injury alleged "fairly can be traced" to the allegedly unlawful action. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 n.25 (1976). We therefore do not dispute that respondents have standing to claim that an EIS is required under Section 102(2)(C) in the context of this case (though, of course, we dispute that claim on its merits).

Respondents do not have standing, however, to raise any claim under Section 102(2)(B). Respondents cannot show that OMB's failure to adopt guidelines under Section 102(2)(B) caused the Department of the Interior's failure to prepare an EIS in connection with its annual budget requests for the Wildlife Refuge System. Respondents claim only that OMB should issue guidelines to elaborate the asserted EIS responsibility of federal agencies during the budget process. But such guidelines would neither add to, nor detract from, the duty of each agency to prepare an EIS when Section 102(2)(C) so requires (see App. A, *infra*, 20a). Any claim that respondents are injured by the absence of executive guidelines requiring agencies to do what they (assumedly) are already required to do by statute is based on "unadorned speculation" about the internal processes of government and does not "suffice to invoke the federal judicial power." *Simon*, *supra*, 426 U.S. at 44. See also *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975).

Accordingly, while respondents' allegations are sufficient for standing under Section 102(2)(C), they

do not provide standing for the claim respondents have raised under Section 102(2)(B). Insofar as the complaint alleges a cause of action under Section 102(2)(B), the action should therefore have been dismissed by the district court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1978

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* The Solicitor General is disqualified in this case.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1871

SIERRA CLUB, ET AL.,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. LYNN, DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-1017)

Argued December 7, 1976

Decided May 15, 1978

Peter R. Taft, Assistant Attorney General, Department of Justice, with whom *Raymond N. Zagone*, *L. Mark Wine*, *Dirk D. Snel*, Attorneys, Department of Justice and *Steven Gottlieb*, Assistant General Counsel, Office of Management and Budget, were on the brief, for appellants. Also *Edmund B. Clark*, Attorney, Department of Justice entered an appearance for appellant.

Bruce J. Terris, with whom *Zona F. Hostetler* was on the brief, for appellees.

Before: BAZELON, LEVENTHAL and MACKINNON, *Circuit Judges*

Opinion filed by *Circuit Judge* MACKINNON, concurring in part and dissenting in part.

Before: BAZELON, *Chief Judge*, LEVENTHAL and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: The central legal issue in this case is whether and on what occasions the National Environmental Policy Act (NEPA) requires an agency to prepare an environmental impact statement (EIS) to accompany its annual budget request for the operation of a program having significant environmental consequences.

The particular program that occasioned the lawsuit is the National Wildlife Refuge System (sometimes referred to as System, or NWRS). The System is administered by the Department of the Interior's Fish and Wildlife Service (sometimes referred to as Service, or FWS).

Since the commencement of this suit, the FWS has prepared a programmatic environmental statement on the program which covers operation of the NWRS for the next ten years, centering on a projection of a roughly constant level of funding. No challenge has been made to the adequacy of this EIS. Rather, plaintiffs obtained, and now seek affirmance of, the district court's declaratory ruling that an EIS adequate to then existing circumstances is required with each annual budget request. We reject this *per se* position and hold that the statement prepared by the Service satisfies its NEPA obligations, subject to any future decision of the agency to reevaluate the program or a drastic change of circumstances affecting the operation of the program.

We affirm the district court's other declaratory ruling that the Office of Management and Budget (OMB) is required to develop procedures to fulfill its NEPA obligations in connection with the Budget process.

I. BACKGROUND

A. *The National Wildlife Refuge System*

The National Wildlife Refuge System consists of more than 350 refuges containing more than 30 million acres in 49 of the 50 states. The primary purposes of the NWRS are to preserve endangered species and to sustain populations of migratory birds, particularly waterfowl, by maintaining intact a diverse network of their natural habitats. A secondary purpose of the System is to provide for its educational and recreational use (study, observation, and hunting) by people.

The System is administered by the Service according to the provisions of several statutes.[1] Much of the refuge land was acquired during the 1930's. After a period of little growth during the 1940's and 50's, the System has been enlarged during the 60's and to the present, particularly in the area of wild rivers and of wetlands. (There has recently been increasing recognition of the contribution to the preservation of important wildlife made by wetlands, which have been rapidly depleted.) During this period of territorial growth, new statutory mandates (such as the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543), and increased public use of the NWRS, the resources devoted to staff and maintain the Refuge System have not kept up with the rate of terri-

[1] The most significant of these are:

Fish and Wildlife Coordination Act of 1934, 16 U.S.C. 661; Fish and Wildlife Act of 1956, 16 U.S.C. 742a; Migratory Bird Conservation Act, 16 U.S.C. 715; and Endangered Species Act of 1973, 16 U.S.C. 1531.

torial growth.[2] Between 1973 and 1976, there was a 7% decrease in staffing, while the number of field stations increased by 10 percent.[3] This has led to a substantial ($83 million) backlog of rehabilitation work, as well as unfulfilled construction work, new and replacement, *e.g.*, water control structures, roads, and buildings.[4] Given the policy decision to plan for roughly constant total expenditure (approximately $43 million in 1974 dollars), the FWS focuses on a strategy of increasing the effectiveness of the NWRS in its primary conservation task, while gradually reducing its direct use by the public. The Service's statement (FES) analyzes the environmental consequences of this proposed strategy, alternatives, and mitigating measures.

B. *Plaintiffs' Contentions*

Plaintiffs are three environmental organizations. Their standing will be discussed subsequently. They advance two arguments that section 102(2)(C) of NEPA[5] obligates

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[2] Final Environmental Statement, Operation of the National Wildlife Refuge System, U.S. Fish and Wildlife Service, Department of the Interior, November, 1976 at I-8 through I-9 [hereinafter FES at I8-I9].

[3] *Id.* at I8.

[4] *Id.* at I9.

[5] Section 102(2)(C), 42 U.S.C. § 4332(2)(C), provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible:
>
> * * * *
>
> (2) all agencies of the Federal Government shall—
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the

> human environment, a[n environmental impact statement]. . . .
>
> * * * *
>
> Copies of such statement . . . shall be made available . . . to the public as provided by section 552 of title 5, United States Code [the Freedom of Information Act], and shall accompany the proposal through the existing agency review processes.

[6] Section 102(2)(B), 42 U.S.C. § 4332(2)(B) directs all agencies of the federal Government to:

> identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.

[7] Sierra Club v. Morton [National Wildlife Refuge System], 395 F. Supp. 1187 (D.D.C. 1975).

the Service to prepare an EIS on each annual budget request for the System: (a) that past and present proposals to cut down on NWRS operations are "proposals for legislation . . . significantly affecting the quality of the human environment . . .," or (b) that the NWRS is so vital to protection of the environment that the annual proposal on the scope and nature of its operation *per se* "significantly affect[s] the quality of the human environment."

Plaintiffs further contend that section 102(2)(B) of NEPA[6] requires OMB to develop procedures to assure consideration of environmental factors in the budget process, including identification of which budget requests have significant environmental consequences and what is required of the agencies of the executive branch in submitting these requests to OMB.

C. *District Court Decision*

The district court granted summary judgment for the plaintiffs[7] on the basis of the *per se* argument concern-

ing budget proposals for operation of a major environmental program such as the NWRS. The court relied on the guidelines implementing NEPA issued by the Council on Environmental Quality (CEQ). These guidelines explicitly include "requests for appropriations" within the definition of "action" for NEPA purposes.[8] The court also relied on cases requiring an EIS in connection with the request for appropriations to construct or otherwise

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[8] *National Wildlife Refuge System, supra,* 395 F. Supp. at 1188, *citing* 40 C.F.R. § 1500.5(a)(1) which provides:

> "Actions" include but are not limited to:
>
> (1) Recommendations or favorable reports relating to legislation including requests for appropriations.

CEQ was established by NEPA in part to oversee implementation of NEPA. Its guidelines, issued by authority of Executive Order 11514, § 3(h) (1970), 3 C.F.R. § 272 (1974), are entitled to considerable weight. *E.g.* Scientists' Institute for Public Information v. AEC [SIPI], 156 U.S.App.D.C. 395, 404, 481 F.2d 1079, 1088 (1973); Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1178 (6th Cir. 1972); Greene Co. Planning Board v. FPC, 455 F.2d 412, 421 (2d Cir.), *cert. denied,* 409 U.S. 849 (1972); Sierra Club v. Morton [Northern Great Plains Coal], 169 U.S.App.D.C. 20, 35 n.22, 37 n.24, 514 F.2d 856, 871 n.22, 873 n.24 (1975) *rev'd on other grounds sub. nom.* Kleppe v. Sierra Club, 427 U.S. 390 (1976).

The Department of Interior's Manual is in accord with the CEQ Guidelines, stating:

> The following criteria are to be used in deciding whether a proposed action requires the preparation of an environmental statement:
>
> A. Types of Federal actions to be considered include, but are not limited to:
>
> (1) Recommendations or favorable reports to the Congress relating to legislation, including appropriations.

Department of the Interior Manual § 516.5, 36 Fed. Reg. 19344 (Oct. 2, 1971).

initiate a specific project.[9] The court took note of the programmatic environmental statement being prepared by the defendants, but held that since it was directed at the long range goals of the NWRS, it would not satisfy the NEPA requirement of an analysis specifically directed to the proposed action in a "finely tuned" manner.[10] Accordingly, the district court granted the plaintiffs declaratory relief that the defendants were in violation of NEPA, that an EIS was required on the annual budget proposal for the NWRS, and that OMB was required

> to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated.[11]

II. Standing

The defendants challenge the summary judgment granted to plaintiffs in view of their failure to adduce proof of injury in the face of defendants' denial of plaintiffs' standing and assertion of a disputed factual issue as to their injury.[12] Plaintiffs alleged in their complaint that

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[9] *National Wildlife Refuge System, supra,* 395 F. Supp. at 1182, *citing* Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1181 (6th Cir. 1972) and Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973) (development of the liquid metal fast breeder reactor).

[10] *National Wildlife Refuge System, supra,* 395 F. Supp. at 1191.

[11] *National Wildlife Refuge System, supra,* Civ. No. 74-1017, Order at 1 (D.D.C. June 6, 1975), J.A. 92.

[12] "Plaintiffs have no standing to maintain this action." National Wildlife Refuge System, *supra,* Answer at 1 (Oct. 11, 1974), J.A. 22. "In order to prevail on their motion [for summary judgment], plaintiffs must demonstrate . . . that there have been significant reductions in refuge operations

their members use the Refuge System and are affected by the environmental impact of the proposal concerning the operation of the System.[13] Alternatively, plaintiffs assert that their organizational interests in disseminating the information which NEPA requires the proposing agency to compile and disclose provide standing under *SIPI*, *supra* note 8, 481 F.2d at 1087 n.29. These allegations were not supported by affidavits in plaintiffs' motion for summary judgment.

There is little doubt in our mind that some of plaintiffs' hundreds of thousands of nature-oriented members use the Refuge System, so that at least one of them could thereby satisfy the "minimal" standing requirements of *Sierra Club v. Morton* [*Mineral King*], 405 U.S. 727, 734 (1972) and *United States v. SCRAP* [SCRAP I], 412 U.S. 669, 688-90 (1973).[14] Plaintiffs did not file specific

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and that they have been injured. None of these facts have been proved." *Id.*, Defendants' Statement of Genuine Issues at 1 (Apr. 8, 1975) J.A. 65.

[13] Plaintiffs, the Sierra Club, the National Parks and Conservation Association, and the Natural Resources Defense Council, are environmental-conservation organizations with combined memberships of approximately 200,000. Typical of the standing allegations in the complaint is the following:

> Plaintiff Natural Resources Defense Council, Inc. (NRDC) is suing on behalf of itself and its members. Many of NRDC's members use the National Wildlife Refuges for recreational and other purposes, and are affected by the environmental impacts on these refuges from the proposals for legislation and other major federal actions described in this complaint. They have a right under NEPA to assess and comment on the environmental impacts of, and alternatives to, these proposals. This right is being denied by defendants' failure to fulfill their responsibility under NEPA.

Id., Complaint at 5, (July 5, 1974), J.A. 11.

[14] Sierra Club v. Morton [Northern Great Plains Coal], 169 U.S.App.D.C. 20, 34 n.20, 514 F.2d 856, 870 n.20 (1975),

affidavits to that effect. On the other hand, one can hardly say that the issue was sharply drawn by the defendants' pleadings. In their statement of genuine issues opposing summary judgment, the defendants denied that plaintiffs had "been injured" by operation of the Refuge System or budget decisions concerning the System.[15] However, this point was made in the context of defendants' denial of the allegation that there were plans to reduce the funding of the NWRS with consequent impairment of the Refuge System. Defendants' pleadings did not specifically contest the proposition that plaintiffs' members use and are affected by the System and how the FWS proposes to operate it, which was the underpinning of the *per se* argument accepted by the district court. While we do not minimize the importance of standing requirements, the issue is whether their disposition required a trial to resolve pertinent issues of fact. A trial is not automatically required by a general denial of standing. However, to avoid any possible implication of foreclosure or estoppel, we make it clear that on the remand for further proceedings, if there is a genuine issue as to use of the Refuges by plaintiffs' members, defendants may raise it in appropriate proceedings.[16]

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rev'd on other grounds sub. nom. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

[15] *National Wildlife Refuge System*, *supra*, Defendants' Statement of Genuine Issues at 1 (Apr. 8, 1975), J.A. 65. *See* note 12, *supra*.

[16] Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1172 (6th Cir. 1972). The primary purpose of the EIS in the scheme of NEPA is to assure compliance with its mandate that agencies proposing legislation or action give due consideration to environmental factors. However, the EIS also serves the important additional function of informing other parts of the government and the public of the environmental consequences of the decision. Jones v. D.C. Redevelopment

III. NEPA and the Budget Process

A. *Absolute Positions on NEPA Applicability*

The plaintiffs' position is simple and logical. NEPA requires "all agencies of the Federal Government" to prepare an EIS to accompany "every recommendation or report on proposals for legislation . . . significantly affecting the quality of the human environment." [17] The EIS guidelines of CEQ, the body established by NEPA to implement that statute, defines an "action" subject to the EIS requirement:

> "Actions" include but are not limited to:

Land Agency, 162 U.S.App.D.C. 366, 375, 499 F.2d 502, 511 (1974). Thus, we have held that an organization with an institutional concern with informing both its members and the public on matters of public policy and decisions which fall within the concern of NEPA has a statutory right to the information which NEPA obliges the agency to compile in an EIS. Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 403 n.29, 481 F.2d 1079, 1087 n.29 (1973). In the case of a proposal for legislation—appropriations in *SIPI*, quasi-legislative approval by another agency in *Jones*—the organization has an interest in getting the environmental consequences of the proposal in the open and before the legislature in aid of its participation in the legislative process. The question arises whether this is a legal interest sufficient to maintain an action to enforce NEPA, in effect an interest created by the statute.

This alternative ground of standing was similarly alleged but not supported by affidavits. Since plaintiffs' standing is proper and more straightforward under the members' use doctrine of Sierra Club v. Morton [Mineral King], 405 U.S. 727, 734-35 (1972), we do not anticipate that it will be necessary to pursue the "informational NEPA entitlement" issue in this case.

[17] Section 102(2)(C), 42 U.S.C. § 4332(2)(C).

> (1) Recommendations or favorable reports relating to legislation including requests for appropriations.[18]

The other prerequisite of an EIS requirement, that the action significantly affect the environment, has been given a broad reading in favor of obtaining the benefits of an EIS in instances of borderline environmental significance.[19] Thus, according to the plaintiffs, an EIS is required in connection with the FWS's budget proposal for funding the upcoming fiscal year's operation of a program with great environmental significance, the NWRS.[20]

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[18] 40 C.F.R. 1500.5(a). *See* note 8, *supra*. More generally, the Supreme Court has stated:

> [w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officer or agency charged with its administration.

Udall v. Tallman, 380 U.S. 1, 16 (1965). *See also* E.I. duPont de Nemours v. Train, 430 U.S. 112, 134-35 (1977). This principle has full vitality as to agencies charged with implementing statutes passed with the objective of protecting the environment.

[19] Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Service, 159 U.S.App.D.C. 158, 168-69, 487 F.2d 1029, 1039-40 (1973).

[20] Plaintiffs argue that

> the National Wildlife Refuge System, by its very nature, size, and scope, is itself a vital part of the protection of the environment. Consequently, annual proposals for financing programs of the . . . System necessarily have significant effects upon the environment.
>
> * * * * *
>
> [E]ven when the proposed budget is the same as, or more than, the prior year's budget, the proposal not to increase further the budget—to provide, for example, additional staff to protect the wildlife more adequately or service increasing numbers of visitors, to increase rehabilitation of deteriorating facilities, or to purchase more lands for the system—significantly affects the quality of the environment.

Brief for Appellees at 34-35.

The defendants counter that the FWS's proposal to OMB is only an intermediate step in the budget process and that only the actual Budget submitted by the President could be considered a proposal for legislation, and that this presidential submission would be the earliest action possibly triggering NEPA.[21] Defendants deny that NEPA imposes any obligation on OMB in its preparation of the Budget; they rely on the confidentiality of the budget process, *see* 31 U.S.C. §§ 15, 24; and they claim that OMB and FWS are not "agencies"—either within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(1), or under NEPA—when they are acting as advisers and staff assistants to the President in making his Budget.

A similar issue has arisen in connection with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and its applicability to entities within the Executive Office of the President. In *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971), without deciding whether the APA definition of "agency" includes the President, we held the Office of Science and Technology (OST) to be an "agency" based on congressional understanding of its role assigned by the reorganization plan in which it was created and in which its position was equated to the Budget Bureau.[22] Congress added a definition of "agency" in the 1974 FOIA amendments to include:

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[21] Aberdeen & Rockfish R.R. Co. v. SCRAP [SCRAP II], 422 U.S. 289, 320-21 (1975).

[22] Soucie v. David, 145 U.S.App.D.C. 144, 151, 448 F.2d 1067, 1074 (1971).

> By virtue of its independent function of evaluation federal programs, the OST must be regarded as an agency, subject to the APA and the Freedom of Information Act.

Id. at 152, 448 F.2d at 1075.

> . . . or other establishment in the executive branch of the Government (including the Executive Office of the President) . . .[23]

The legislative history makes it clear that Congress adopted the *Soucie* result. The Conference Report states:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.[24]

Preparation of the Budget is an aid to Congress as well as an instrument of presidential policymaking and control over the executive bureaucracy. OMB has a statutory duty to prepare the Budget, in addition to its multitudinous other management, coordination, and administrative functions.[25] Congress signified the importance of

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[23] 5 U.S.C. § 552(e).

[24] S.Rep. No. 93-1200, 93rd Cong., 2d Sess. 15 (1974), 1974 U.S. Code Cong. & Ad. News 6293.

[25] There is in the Executive Office of the President an Office of Management and Budget. There shall be in the Office a Director and a Deputy Director, both of whom shall be appointed by the President, by and with the advice and consent of the Senate. The deputy director shall perform such duties as the director may designate, and during the absence or incapacity of the director or during a vacancy in the office of director he shall act as director. The Office, under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for

OMB's power and function, over and above its role as presidential advisor, when it provided, also by amendment in 1974, for Senate confirmation of the Director and Deputy Director of OMB.[26] Thus, OMB is not totally exempt from the FOIA by its definition of "agency." We are equally convinced that OMB is not exempt by definition from NEPA. Exactly what NEPA requires of OMB in the budget process in general is not presented on this appeal and awaits OMB's response to the district court's declaratory judgment that it is OMB's function, at least in the first instance, to delineate the appropriate scope of a NEPA obligation that would be both feasible and meaningful.

We now turn to the question of what NEPA requires, annually or occasionally, in connection with decisions about the operation of the NWRS.

B. *Review of NWRS Operations*

Plaintiffs' logic-based contention (*see* note 20 and accompanying text *supra*) leads logically to the conclusion that an EIS would have to accompany every budget request for the annual operation of an environmental-conservation program, or indeed of an agency whose activities may have significant environmental impact.[27] The

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appropriations of the several departments or establishments.

31 U.S.C. § 16 (1976). *See also* H.Rep. No. 93-697, 93rd Cong., 2d Sess. Appendix (1974) for a summary of OMB's numerous other statutory duties.

[26] 31 U.S.C. § 16, note 25, *supra*, amended by P.L. 93-250, § 1 (Mar. 2, 1974).

[27] This would include, *e.g.*, the ICC, *see SCRAP II*, *supra*, 422 U.S. at 320-21, 322-27; and the SEC, *see* Natural Resources Defense Council v. SEC, 389 F. Supp. 689 (D.D.C. 1974); Civ. No. 409-73 (D.D.C. May 19, 1977), C.C.H. Fed. Sec. L. Rep. ¶ 96,057 (June 2, 1977).

principle of *reductio ad absurdum* is part of the landscape of logic. Plaintiffs have not suggested a limiting principle to their logic.

Plaintiffs have put forward as an alternative an escape hatch that would limit the EIS requirement to instances of an alleged cutback in some aspect of NWRS activity, as in the level of NWRS staffing and maintenance, leveling of total expenditure, and lack of acquisition of new refuges.

The difficulty of limitation still obtains. Every agency has limited resources and has to establish priorities among its programs and activities within a program. Some areas and functions are given new emphasis, others are reduced. Some of these decisions, such as a decision to decline to expand the National Park System, may be of great environmental significance. In general, however, if there is no proposal to change the status quo, there is in our view no "proposal for legislation" or "other major Federal action" to trigger the duty under NEPA to prepare an EIS.

It would be absurd to require an EIS on every decision on the management of federal land, such as fluctuation in the number of forest fire spotters. We know of no case pushing NEPA to such extremes. The cases cited on this point by the plaintiffs involve initiation or construction of a new project, or a sale of federal resources.[28] The cases requiring an EIS in connection with appropriations

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[28] *E.g.*, National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973) (exchange of national forest land for private land); Minnesota Public Interest Research Group v. Butz, 358 F. Supp. 584 (D.Minn. 1973) *aff'd* 498 F.2d 1314 (8th Cir. 1974) (en banc) (timber sales in Boundary Waters Canoe Area), 541 F.2d 1292 (8th Cir. 1976) (en banc); Businessmen Affected Severely By the Yearly Action Plans v. D.C. City Council, 339 F. Supp. 793 (D.D.C. 1972) (rezoning tract to permit construction of commercial building).

requests involve proposals for construction or development of a project.[29] There is a danger of overburdening NEPA by spreading its mandate too widely. The environmental analysis required by NEPA is governed by the rule of reason, as we have held in determining the scope of real-

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[29] The leading case for the proposition that an appropriation request is a "proposal for legislation" under NEPA, Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1181 (6th Cir. 1972), involved the construction of a dam and reservoir. *Accord*, Realty Income Trust v. Eckerd, No. 76-1062 (D.C. Cir. June 29, 1977) (congressional committees' approval of construction of a federal building); Atchison, Topeka, and Santa Fe Ry. v. Callaway, Civ. No. 74-1190 (D.D.C. May 2, 1977) (construction of dam and locks).

An EIS was required for the program to develop a liquid metal fast breeder reactor (LMFBR) in Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973). NEPA was held applicable to the LMFBR program on the basis of "a 'proposal for legislation' each year, in the form of appropriations requests by the [Atomic Energy] Commission." *Id.* at 404, 481 F.2d at 1088. The LMFBR program involved the development of a new energy technology and the expenditure of R & D funds which would partially determine the energy alternatives later available to the nation.

Kleppe v. Sierra Club, 427 U.S. 390 (1976) does not preclude the applicability of NEPA in this case. Its holding that no EIS was required was based on the finding that there was no program to analyze.

> But there is no evidence in the record of an action or a proposal for an action of regional scope.
>
> * * * *
>
> In the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement.

Id. at 400-01. Here, there clearly is a program—the Refuge System, which the FWS treats as a program and on which it has prepared a programmatic EIS.

istic alternatives to the proposed action[30] and the intensity of the required analysis.[31] A rule requiring preparation of an EIS on the annual budget request for virtually every ongoing program would trivialize NEPA. In our view, section 102(2)(C) contemplates a "proposal" for taking new action which significantly changes the status quo, not for a routine request for budget approval and appropriations for continuance and management of an ongoing program.

We hasten to add the qualification that NEPA may have application to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. The need is for a reading of NEPA that harmonizes its words, its purposes, and the rule of reason. Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review. A review of such a nature reflects choices that should under NEPA be made in the light of a full consideration of pertinent environmental consequences and alternatives.[32]

We have no occasion at this time to consider whether, or in what instances, a "new look" may be required be-

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[30] Natural Resources Defense Council v. Morton [Outer Continental Shelf Leasing], 148 U.S.App.D.C. 5, 12, 15, 458 F.2d 827, 834, 837 (1972) (cited with approval in Vermont Yankee Nuclear Power Corp. v. NRDC, 46 LW 4301, 4309 (S.C. Apr. 3, 1978).

[31] Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 408, 481 F.2d 1079, 1092 (1973).

[32] Such an appropriations request may have no more significant effect on the environment than the previous year's routine request (possibly in the same amount), but the change in context makes it a determinative and meaningful proposal for legislation.

cause of vastly changed circumstances, either by NEPA or perhaps by some other provision of federal law. Nor need we now consider whether a court may mandate any such duty to take a new look.

What we do hold is that an EIS is required when such a new look is had. A new look may be generated periodically and spontaneously as a matter of good management and revitalization of the bureaucracy. It may be a response to external stimulus, as when dramatically changed circumstances cry out for review, or perhaps to accommodate existing programs to changes in the agency's statutory mandate. It is clear that there is wide discretion in the agency to determine when such review will be conducted. That is the essence of government and administration. It is impossible to have a "new look" at everything all the time. When there is such a new look the ensuing request for appropriations is a "proposal for legislation" under NEPA.

We need not decide whether this kind of painstaking reappraisal of the NWRS was required at the time plaintiffs brought this lawsuit, because the FWS has since undertaken one. The Programmatic EIS evaluates the environmental consequences of the proposed operation of the NWRS and alternatives thereto over the next decade. The FWS has indicated that it intends to make an analysis from scratch at the end of those ten years; in the meantime, it will update the environmental study in light of changed plans and circumstances.[33]

The Programmatic EIS sets forth the environmental consequences of the FWS's present plan to operate the NWRS at a roughly constant real level of expenditure

[33] The principle of an agency's borrowing existing environmental analysis from available sources, Natural Resources Defense Council v. Morton, *supra* n.30, at 15, 458 F.2d at 837, applies equally to a borrowing from an agency's own prior analyses.

with priority given to its conservation mission over public use—recreational and educational. It also considers the effects of alternate program priorities and expenditures. The adequacy of the EIS for what it is (a long-term strategy and analysis) has not been challenged by plaintiffs on appeal. The controversy presented to this court concerns the district court's ruling that an EIS is required in the future for each and every annual budget request. We hold to the contrary.

C. *OMB's Obligation*

NEPA requires all agencies of the federal government to:

> identify and develop methods and procedures, in consultation with [CEQ], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration along with economic and technical considerations.[34]

This requirement is applicable to OMB as the agency responsible for preparation of the budget and other executive legislative proposals, a conclusion drawn from the Act itself and supported by the legislative history and administrative regulations.[35] Our view that some but not

[34] Section 102(2)(B), 42 U.S.C. § 4332(2)(B).

[35] *See* text at note 25, *supra*. The legislative history of NEPA indicates that Senator Jackson, the prime mover of NEPA, anticipated that OMB would play a large role in coordinating agency compliance with NEPA. *National Environmental Policy: Hearing on S. 1075, S. 237 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116-17 (1969).

OMB's role is also identified in the CEQ Guidelines. CEQ's central role with regard to NEPA generally appears from Executive Order 11514, note 8, *supra*. The CEQ Guidelines issued pursuant to that Executive Order envision an OMB role in enforcing NEPA's "proposals for legislation" branch in this provision:

[Continued]

all (and certainly not routine) requests for appropriation are "proposals for legislation" under § 102(2)(C) underscores a need, on the part of agencies, for guidance in determining when an EIS is required in connection with a budget request.

These observations clarify the obligation imposed by NEPA and OMB, as the key agency in the executive's budget formulation process, to give appropriate guidance to the agencies. The district court granted declaratory relief that NEPA requires:

> Defendant Director of the Office of Management and Budget to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated.[36]

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[35] [Continued]

> [CEQ] and [OMB] will cooperate in giving guidance as needed to assist agencies in identifying legislative items believed to have environmental significance. Agencies should prepare impact statements prior to submission of their legislative proposals to [OMB]. In this regard, agencies should identify types of repetitive legislation requiring environmental statements (such as certain types of bills affecting transportation policy or annual construct authorizations).

40 C.F.R. § 1500.12(a).

Apart from the CEQ regulation, we find a specific duty in NEPA's requirement to "identify and develop methods and procedures," 42 U.S.C. § 4332(2)(B). In our view, this provision obligates OMB, in its core role as manager of the budget process, to promulgate guidelines to identify those budget or other appropriations proposals which are subject to the requirements of section 102(2)(C), 42 U.S.C. § 4332(2)(C), as "proposals for legislation."

[36] Sierra Club v. Morton [National Wildlife Refuge System], Civ. No. 74-1017, Order at 1 (D.D.C. June 6, 1975), J.A. 92.

The parties have not focused on this aspect of the district court's ruling and we might treat it as not appealed. However, the government defendants might argue that it was implicitly subject to further consideration in the light of their main contention. And the rulings we have made on the type of budget and appropriation requests that require an EIS will obviously affect the obligation put on OMB. To avoid uncertainty, we have considered the matter and affirm the ruling that requires OMB to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process when it culminates in proposals for legislation under the principles previously discussed.

This is not an onerous task. Preparation of the Budget is OMB's central function in helping the President coordinate the policy of the agencies and establish priorities for his administration. As it stands, the declaratory judgment imposes a duty on OMB to initiate the delineation of the procedures required by NEPA in connection with the budget process.[37] This task will be eased and simplified, we anticipate, by our rulings identifying what types of requests to the legislature for appropriations do and do not require preparation of an EIS, as well as

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[37] Since this issue has not been focused in this case, we have not researched OMB's formal or informal directives to the agencies for NEPA compliance, particularly in connection with their appropriations and other legislative proposals. *See* F. Anderson, *The National Environmental Policy Act*, in Federal Environmental Law 331-35 (E. Dolgin & T. Guilbert eds. 1974); W. Rodgers, Environmental Law, 705, 714 (1977). OMB may already have some guiding regulations in this area as a foundation for the required procedures and methods. In any event, the declaratory judgment obliges OMB to look at its procedures and methods for assuring inclusion of environmental values in the budget process and to revise them if necessary to conform to its views of what NEPA requires, consistently with this opinion.

clarifying the bounds of an agency's discretion in undertaking a reevaluation of an ongoing program.

OMB will give consideration to how obligations under NEPA can be discharged without violating the principle that holds an agency's budget requests confidential prior to final review by the President. We do not expand on the problem here. For one thing, it was not developed by the government's appeal. Furthermore, we anticipate that the OMB will wish to ponder the matter afresh in light of the rulings in this opinion. The matter may be capable of resolution in a manner that presents program proposals in terms that permit an environmental analysis, without disclosure of dollar projections or other betrayal of genuine budget confidence. Since requirement of an environmental impact statement in connection with budget proposals will arise in relatively few instances, under the principles we have set forth, and since proposals for major program reviews and changes can probably be disclosed in general outline, sufficient for impact statement purposes, without undercutting the objectives underlying budget-type secrecy, OMB can fairly be called on to develop a proposal that serves and harmonizes both NEPA and budget processes. Certainly the fact that a proposal is subject to further review by the Executive is no bar to NEPA's requirement for an environmental statement. On the contrary, NEPA calls for an EIS precisely so that environmental consequences may be taken into account before a final decision is reached by the executive official or agency.

IV. Conclusion

NEPA has been salutary in heightening agency attention to environmental values, in part by requiring disclosure of environmental consequences. However, we cannot allow NEPA to be bloated, and indeed enfeebled, by pushing the logic of Section 102(2)(C) to ridiculous

extremes. NEPA does not require an annual,EIS on routine operation and maintenance of every program with significance environmental ramifications. Its rule of reason does not demand rethinking of everything all the time.

The Fish and Wildlife Service has undertaken a reevaluation of the National Wildlife Refuge System, and has done an analysis of its long term plan for operation of the System. We are not presented with a challenge to the validity of that exercise of discretion. In view of the programmatic EIS it has prepared there is no further obligation under NEPA at this time.

The judgment obligating defendants to prepare an annual EIS on NWRS operations is reversed. We affirm the judgment declaring OMB's duty to develop methods and procedures to implement the NEPA obligation to provide environmental impact statements to accompany those proposals on budget and appropriations that are proposals for legislation. This duty, as set forth in this opinion, applies when the request for budget approval and appropriations is one that proposes a considered programmatic course following a programmatic review. OMB will have latitude to propose a method that harmonizes both NEPA and budget processes.

The case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: I concur in the foregoing opinion insofar as it reverses the declaration of the district court requiring defendants to prepare an Environmental impact Statement (EIS) with each annual request for appropriations to operate the National Wildlife Refuge System (NWRS). In my opinion such requirement would be wholly unreasonable in that it would result in an interpretation of the NEPA never intended by Congress. The court's rejection of the Sierra Club's position has my concurrence, but because the opinion has attempted to rely on a flexible "rule of reason" approach, rather than heeding the straight-forward words of NEPA, its holding in my opinion does not go far enough in rejecting any EIS requirement for annual appropriation requests.

The court's opinion holds that a "rule of reason" must be applied limiting the language of the regulation. It bases this conclusion on the plain meaning of CEQ regulation 40 C.F.R. § 1500.5(a) which states that an "action" subject to the EIS requirement includes "recommendations or favorable reports relating to legislation *including requests for appropriations*" (emphasis added) and points out that if the contentions of appellee were upheld they would mandate the absurd result that all requests for appropriations would require EISs. The reasonable limitation so imposed is that routine requests for appropriations may be distinguished from intensive "new looks" at a program's budget, it being reasonable to require EISs of the latter but not of the former. Actually the only issue before us is the court's holding with respect to the annual appropriation request for the NWRS and so there is no necessity for any dictum as to the ultimate limits of the rule.

I agree that it would be unreasonable to require EISs for every major budget request. In addition to the unreasonableness of such construction of the statute, the

intent of Congress and the uniform precedents from generations of legislative procedings clearly indicate that Congress has never considered "requests for appropriations" to be either "proposals" or "proposals for legislation or major federal action." In my opinion the entire budget request process for the NWRS involved here is outside the EIS requirement of NEPA.

I

Standing

As a preliminary issue, I concur in that part of the court's opinion that directs the lower court on remand to consider the issue of whether or not the Sierra Club has standing. The lower court granted summary judgment for the appellees and in so doing must perforce have determined that they did have standing to bring this suit. The Sierra Club, however, submitted no affidavits indicating either that any of its members or its fellow appellees' members in fact used the Wildlife Reserves in question, or that their enjoyment of these areas would be in any way affected by the NWRS budget proposals. An organization which does not prove injury to itself or its members has no standing to challenge harm to the environment, *Sierra Club v. Morton*, 405 U.S. 727 (1972); Davis, *Administrative Law in the Seventies* § 22.19 (1976). Here the complaint of the Sierra Club alleges injury, but these allegations have been denied and are not supported by any evidence of record. Allegations on which standing is premised must be both "true and capable of proof at trial," *United States v. SCRAP*, 412 U.S. 669, 668-689 (1973) (SCRAP I). In this case, where plaintiff's standing allegations are controverted, and particularly in light of the summary disposition effected by the lower court, it is necessary that the facts upon which standing is premised be not only alleged but demonstrated, *Northern Great Plains Coal Case, Sierra Club v. Morton*, 514 F.2d 856, 869-870 n.20 (D.C. Cir. 1975),

rev'd on other grounds, 427 U.S. 390 (1976). In this record there is no evidence at all that appellees' allegations are "capable of proof." As the opinion of Judge Leventhal states, there seems little doubt that the Sierra Club can offer proof that some of its members make use of the Wildlife Refuges involved in this case, but appellees must offer proof of that fact, not merely allegations.

However, even though appellees do prove that some of their members use the Wildlife Refuges, they still must clear what is to my mind a much more difficult hurdle before they can be held to have demonstrated their standing. Appellants strenuously argue that there is no evidence that any of the budget requests submitted by the Department of the Interior and the OMB will result in the curtailment of any identifiable refuge or refuge activity. It may well be true that the staff reductions proposed will not in fact impair the quality of the Wildlife Reserves or their availability. Indeed, one affiant testified that such lands as wilderness areas are best managed by *not* being managed at all. This argument is not devoid of logic. Appellees must demonstrate that some denial of service to them, *i.e.*, the injury which allegedly gives them standing, "in fact results from" the challenged budget requests, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976); *see also Linda R. S. v. Richard D.*, 410 U.S. 614, 617-18 (1973); *King's County Economic Commercial Development Ass'n v. Hardin*, 476 F.2d 478 (9th Cir. 1973). The seemingly self-evident truth that a decline in funding will result in the decline of the quality of the service provided is overly facile when dealing with areas whose chief value in the environmental scheme lies in being preserved as nature would leave them. Moreover, unless appellees can demonstrate a causal connection between the proposed appropriation and some identifiable decline in one of its member's use of a wildlife refuge, the Sierra Club is in effect asking this court to litigate not as to a particular

injury, but, assuming any injury at all exists, as to a general injury suffered by the public at large, which courts may not be empowered to rectify, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 215-227 (1974). On remand, the District Court must consider and require proof concerning these questions relating to standing.[1]

II

Budget Requests as "Proposals"?

The appellees attempt to bring budget requests under the statutory language requiring EISs for "proposals for legislation or other major federal actions." Since it is my opinion that such requests are not "proposals," and even if "proposals," are not proposals for either legislation or major federal action, I find no merit whatsoever in the Sierra Club's argument.

Appropriation requests by departmental units cannot be considered "proposals" until they have achieved at least that degree of finality only attained when the President has formally determined to transmit the departmental request to Congress as part of his budget. *See Northern Great Plains Coal* Case, 427 U.S. 390

[1] Appellees also maintain that as an alternative to demonstrating customary "injury in fact" standing, they should be given standing because they were denied, by the NWRS and the OMB's failure to file EISs, "the information which would be provided by an environmental impact statement and the opportunity to comment on the statement and thereby to participate in the decisionmaking process." Brief for Appellees at 18. This novel theory of standing is, on the facts of this case, disposed of adversely to appellees' position by United States v. Richardson, 418 U.S. 166, 176-77 (1974) and The Mineral King Case, Sierra Club v. Morton, 405 U.S. 727, 736 (1972) with sufficient conclusiveness that it does not merit extended discussion here. It might be characterized as a claim that they had standing because they did not have access to facts that might have proved standing.

(1976) wherein the Supreme Court struck down a decision of the Court of Appeals which held that NEPA empowered a court to require the preparation of an impact statement to begin at some point prior to the formal recommendation or report on a proposal. 427 U.S. at 404. In finding such action outside the intent of the statute the Court stated:

> The statute clearly states when an impact statement is required [that is] under the first sentence of § 102 (2) (C) the moment at which an agency must have a final statement ready "is the time at which it makes a recommendation or report on a *proposal* for federal action." *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320 (1975) (SCRAP II) (emphasis in original).

427 U.S. at 405-406. And further:

> A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.*

427 U.S. at 406 (emphasis in original).

It is clear that in the budget-making process there is no final proposal until the President includes the item in his budget to Congress. Not only are the suggestions made by OMB and the various agencies confidential until the President transmits them to Congress as part of his formal budget,[2] but moreover, the statutory and constitutional scheme governing the budget-making process make it clear that the task of submitting a proposed budget is solely a *presidential* responsibility.[3] It is not

[2] *See infra*, p. 19-22.

[3] *See* § 207 of the Budget and Accounting Act, 1921, 42 Stat. 22, 31 U.S.C. § 16, as amended by § 101 of Reorganization Plan No. 2 of 1970, 84 Stat. 2085.

until the President himself has acted that any budget request has been *proposed*.[4] The requests for supply that are forwarded through the various agencies and the OMB for final presidential approval are purely pre-decisional and under the statute do not constitute proposals which require filing an EIS, *cf. Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320-21 (1975) (SCRAP II). To a certain extent, it would make as much sense to require cabinet ministers to submit EISs on suggestions made at confidential cabinet meetings as it would to require EISs of the OMB—merely a unit in the Executive Office of the President[5] in this case. NEPA was never intended to apply to incipient requests.

III

Budget Requests as "Proposals for Legislation"?

Even when the President has in fact transmitted his budget to Congress, assuming that such transmittal does indeed involve a "proposal," such proposals do not, to my mind constitute proposals for *legislation* or major federal action" within the intendment of Congress. NEPA provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

[4] For an analagous situation where recommendations apparently even more final than OMB and certainly than agency budget requests were (and continue to be) not deemed final until the President has approved them, *see* C & S Air Lines v. Waterman Corp., 333 103, 114 (1948), where CAB orders as to certificates for overseas or foreign air transportation were not "mature" or susceptible to judicial review until approved by the President.

[5] 31 U.S.C. § 16 (1970) provides: "There is in the Executive Office of the President an Office of Managament and Budget."

> (C) include in every recommendation or report on proposals for *legislation* and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes . . .

42 U.S.C. § 4332(2)(C) (emphasis added).

The appellees have consistently contended throughout this litigation that the *annual appropriation requests* to

finance the National Wildlife Refuge System are proposals by federal agencies (1) "for *legislation* or other major federal actions" significantly affecting the environment.[6] Appellees include in this phase of their argument the contention that an EIS is required whenever the NWRS in any given year (1) does not initiate a request, as they had in the past, for appropriations to purchase additional lands for refuge,"[7] and whenever (2) a request is submitted that involves a reduction or alteration of the use of appropriations.[8]

The rationale underlying these arguments, so far as the contention that these acts might constitute "legislation" is concerned, is that all functions of the agency have a vested right, which can be enforced by third parties, naturally and routinely to continue to receive the largest sums ever appropriated for a given purpose; and any change—even that of not continuing to expand the program by the purchase of *new* refuge areas at the same rate of increase as in the past—amounts to a change in the law, *i.e.*, to "legislation." In my view such

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[6] Plaintiffs [appellees] contend that these *annual* proposals to finance the National Wildlife Refuge System are proposals by federal agencies (1) for *legislation* significantly affecting the environment; and (2) for major federal action significantly affecting the environment. Consequently, plaintiffs submit, defendants are required by the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.*, to prepare, disseminate and consider statements concerning the environmental impacts of such proposals. Plaintiffs also claim that the Office of Management and Budget has failed to identify and develop the formal methods and procedures required by Section 102(2)(B) of NEPA and the Guidelines of the Council on Environmental Quality implementing the National Environmental Policy Act, 40 C.F.R. 1500.3.

Appellees' Brief, p. 3 (emphasis added).

[7] *Id.*, p. 30.

[8] *Id.*, pp. 29-34.

a contention is completely unsupportable either as legal doctrine or as an interpretation of congressional intent. Judge Leventhal has referred to the absurd consequences it would entail and I agree with that conclusion.

Apart from the patent absurdity of the result suggested by appellee, I also find their claim in this respect to be contrary to the meaning that Congress has traditionally intended when it refers to "legislation." This conclusion is supported by the precedents in Congress that evidence the distinction in the mind of Congress, as to what does and what does not constitute *legislation*.

Traditionally, Congress has distinguished between "legislation" and an "appropriation." The congressional practice in this respect is set forth in L. DESCHLER'S PROCEDURE (1974):

> § 7. An item contained in a general appropriation bill must be authorized by law. Statutory authority for the appropriation must exist. . . . 119 CONG. REC. p. ... , 93d Cong., 1st Sess., June 5, 1973 [H.R. 8619].

Id. p. 266 (emphasis added). It is the law *authorizing* appropriations that Congress refers to as "legislation," not the subsequently resulting appropriations. All appropriations must first be authorized by laws which emanate from the select committee having jurisdiction of that function of government, not from the Appropriations Committee. This distinction in meaning is pointedly set forth in the House Rule prohibiting the inclusion of *legislation* in appropriation bills:

> § 1.1 The prohibition against inclusion of legislation in general appropriation bills is provided for by House rule. It states: "Nor shall any provision in any such bill or amendment thereto *changing existing law* be in order, except such as being germane to

the subject matter of the bill shall retrench expenditures. . . ." (Clause 2 Rule XXI.)

§ 1.2 Language in an appropriation bill changing existing law is *legislation* and not in order. 105 CONG. REC. 12125, 86th Cong. 1st Sess., June 29, 1959 [H.R. 7978].

L. DESCHLER'S PROCEDURE, p. 295 (emphasis added).

While this rule is limited to general appropriation bills, the italicized passages clearly indicates that when Congress refers to "legislation" it means "changing existing law."

In the same vein, legislation is defined as "the function of making *rules* . . ." *Webster's Third New International Dictionary* 1291 (3d ed. 1961) (emphasis added). The supply of a sum of money is not the making of a rule. Thus congressional and common English usage make it clear that the furnishing of money for previously authorized purposes is not "*legislation.*" The congressional precedents that support this interpretation are legion. However some courts may have interpreted "legislation," [9] it is the intent of *Congress* that controls. And in

[9] *Cf.* Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972), where the court overlooked that the CEQ Guideline it relied upon referred to "*legislation* including that for appropriations," i.e., "legislation including *legislation* for appropriations," which would refer to *authorizations* for appropriations. 468 F.2d at 1181; Scientists' Institute for the Public Interest, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) contains the same approach. 481 F.2d at 1088. Neither of these cases take stock of the congressional intent evident in its use of the terms "legislation" and "appropriations" for more than a hundred years. This should not be lightly disregarded in favor of loose street language. After all, Congress does have some greater familiarity with "legislation" and "appropriations" than the average uninformed citizen. Environmental Defense Fund v. Froehlke, 348 F. Supp. 338, 364 (W.D. Mo. 1972).

my view when Congress in the Environmental Protection Act referred to "legislation," with respect to legislation in Congress, it intended thereby to convey the same meaning as Congress customarily gives to the term when used in its own proceedings.

The construction of the Act here in question is controlled by what Congress intended and here as elsewhere Congress distinguished between "legislation" and "appropriations." For example, Congress also very pointedly makes the same distinction in the criminal code between "legislation or appropriations," 18 U.S.C. § 1913.[10]

Congress also distinguishes between "legislation" and "appropriations" in 22 U.S.C. § 2394(c)

> . . . any committee of the Congress charged with considering *legislation*, *appropriations* or expenditures under this chapter, has delivered . . . (Emphasis added.)

In addition 42 U.S.C. § 2996e(c)(2)(B) refers to communications

[10] Lobbying with appropriated moneys—No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

18 U.S.C. § 1913 (emphasis added).

> in connection with *legislation or appropriations* directly affecting the activities of the Corporation. (Emphasis added.)

Some courts have also noted the distinction. Justice Harlan in *Barenblatt v. United States*, 360 U.S. 109 (1959) stated:

> Since Congress may only investigate into those areas in which it may potentially *legislate or appropriate*, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

360 U.S. at 111-12 (emphasis added).

This court in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) stated:

> Congressional control over *appropriations and legislation* is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation.

487 F.2d at 778 (emphasis added), quoting from Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 486 (1957).

In *Schneider v. Lansdale*, 191 Md. 317, 61 A.2d 671 (1948) the court noted that the circuit court had based its decision on the

> broad general proposition that the making of appropriations is a legislative function. The issue is much more narrow. It is whether the words "enact legislation" *as used in Article XIA, Sec. 3 of the Constitution* embrace every exercise of legislative power, in the broadest sense of that term, and specifically such matters as the making of budgets and the appropriation of money for county expenses . . . which may be, at least in part, legislative functions.

61 A.2d at 673-74. The court held that the phrase "enact legislation" in the Maryland Constitution did not encompass the making of budgets and the appropriation of money for county expenses.

The Supreme Court of Arizona has also ruled similarly. In a case where the State Auditor contended that a general appropriation bill unconstitutionally violated the provision of the state's constitution restricting each act to one subject, the court held:

> *The general appropriation bill is not in the true sense of the term "legislation"; it is, as the language implies, merely a setting apart of the funds necessary for the use and maintenance of the various departments of the state government already in existence and functioning.*

Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666, 669 (1933) (emphasis added). The court continued at 24 P.2d 670:

> If an act which makes appropriations to the various departments of the state contains, *in addition to appropriations, legislation* of such a nature that its subject must be expressed in the title, this alone would immediately suggest that such legislation could not stand. (Emphasis added.)

The court sustained the auditor's position and denied the writ. This distinction between appropriations and legislation was also recognized in *Carr v. Frohmiller*, 47 Ariz. 430, 56 P.2d 644 (1938), but a different result ensued because the bill did not contain more than one subject. This same distinction has been universally recognized by the parliamentary decisions in Congress.

All precedents in Congress, which in this respect go back as far as 1842, 4 HINDS' PRECEDENTS § 3811 (1907) (hereafter "Hinds' "), make a distinction between "legislation" and the "appropriation" of money by Congress and prohibit the *change* of any existing laws (legislation) in

any general appropriation bill. 4 HINDS' § 381 (1907), §§ 3812, 3813. The enactment of positive law where none exists is construed as "changing existing law" within the rule. *Id.*, §§ 3812, 3813, and thus although the initial legislation *authorizing* a program in need of supply may be "legislation," subsequent appropriations are not. For the lengthy list of congressional precedents involving decisions as to what constitutes legislation, *see* 9 CANNON'S PRECEDENTS, Index, pp. 190-91 (72) (hereafter "Cannon's").

Further support for the position that the intent of Congress was, and is, that "legislation" be restricted to those instances where there has been a "change of law" is found in the doctrine that limitations upon appropriations are not considered to constitute legislation. 7 CANNON'S § 1710. Thus, for example, an amendment that proposes to defer disbursements from an appropriation until a departmental regulation has been enforced does not constitute "legislation," as it is a limitation on an appropriation bill. *Id.*, § 1581. Even when significant interests and policies are affected by such limitations they are still not considered to be "legislation". For instance, HINDS' in § 3987 reports a ruling that it was in order, by a limitation on an appropriation bill, to withhold the appropriations from a designated object even though a *contractual obligation* of the United States for ocean mail service between the United States and foreign ports may thereby be left unsatisfied. It has also been ruled that a provision in an appropriation bill providing that no sums thereby appropriated for that year may be expended for a reformatory within a radius of ten miles of Mt. Vernon, except the one then located at Occoquan, Virginia, merely amounted to a limitation and was in order in an appropriation bill. 7 CANNON'S § 1710 (1935). None of these limitations changed the law, *i.e.*, the statute authorizing the appropriation, hence they were not "legislation."

With respect to appellants' claim that a reduction in an appropriation from one year to another constitutes "legislation," there are a number of precedential decisions in Congress specifically holding to the contrary. It has been ruled that action by the House cutting down an appropriation below the amount authorized by law is not considered to be legislation. That decision was made by Congressman Tilson of Connecticut who in ruling stated:

> "The reason for that rule of limitation is simply this: The House in Committee of the Whole has the right to refuse to appropriate for any object which it may deem improper, although the object may be authorized by law; and it has been contended, and on various occasions sustained by the Committee of the Whole, that if the committee has the right to refuse to appropriate anything for a particular purpose authorized by law it can appropriate for only a part of that purpose and prohibit the use of the money for the rest of the purpose authorized by law. That principle of limitation has been sustained so repeatedly that it may be regarded as a part of the parliamentary law of the Committee of the Whole."

7 CANNON'S § 1710 (1935). The foregoing ruling relied upon a prior ruling by Congressman Dingley of Maine reported at 4 HINDS' § 3936, p. 632 (1907). Thus, retrenchment is not a change of existing law, *i.e.*, it is not "legislation" as Congress uses that term.

Important restrictions on the expenditure of appropriated funds may be embodied in an appropriation bill without enacting "legislation." In considering a bill for the appropriation of funds for the Commission of Fine Arts which provided that no part of such sums shall be expended for traveling expenses, other than those incurred by members of the Commission for actual travel only going to and returning from Washington to attend meetings of the Commission, it was ruled that such provision did not constitute legislation. While the provision

would prohibit the use of funds for a purpose authorized by law it was nevertheless construed to be a proper limitation and not legislation. The reasoning underlying this ruling is that a provision refusing to continue appropriations to the maximum extent authorized by law, and for the maximum purposes authorized by law, does not amount of legislation. CANNON'S § 1656.

During the Sixty-Eighth Congress, existing law provided that investigations could be conducted upon the request of either House, or upon a concurrent resolution of both Houses. An amendment to an appropriation bill offered by Congressman Newton of Minnesota proposed that "no part of the appropriation . . . shall be expended for investigations . . . except those authorized and directed by the concurrent resolution of both Houses." The Chair upheld such limitation in ruling "that Congress may appropriate for one object authorized by law and refuse to appropriate for another object authorized by law," *i.e.*, without such selective appropriation being considered by Congress to constitute legislation. CANNON'S § 1595.

The rule prohibiting legislation in appropriation bills is also construed strictly in favor of the point of order. CANNON'S § 1707. This permits any single Congressman easily to enforce the rule merely by raising a point of order.

This long history, indicating that Congress, in its uniform practices, does not consider that the appropriation of money constitutes "legislation," convinces me that when it referred to "legislation" in the Environmental Protection Act it did not intend "legislation" to include requests for *authorized* appropriations, when the sums requested do not exceed or vary from the amount Congress has fixed in its *statutory authorization*. It is also evident that the foregoing precedents demonstrate that Congress did not intend to include the rise and fall of

annual appropriations for authorized purposes, and within authorized limits, as being within the ambit of "legislation."

While appellees cite the Guidelines of the Council on Environmental Quality, 38 FED. REG. 20550, 40 C.F.R. § 1500 *et seq.*, as expert opinion that Congress in NEPA intended to include budget requests within the scope of the EIS requirement applicable to "proposals for legislation . . . or major federal action," it is my view that the language of these Guidelines is not inconsistent with interpreting the EIS requirement to apply only to legislation *authorizing* appropriations, *i.e.*, to alterations in the existing law, not merely annual budget requests.[11]

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[11] Appellees cited the following:

1500.2. *Policy*

(a) As early as possible and in all cases prior to agency decision concerning recommendations or favorable reports on proposals for (1) legislation significantly affecting the quality of the human environment * * * (hereafter "legislative actions") and (2) all other major Federal actions * * * Federal agencies will, in consultation with other appropriate Federal, State, and local agencies and the public assess in detail the potential environmental impact.

* * *

1500.5 *Types of Actions covered by the Act*

(a) "Actions" include but are not limited to:

(1) Recommendations of favorable reports relating to legislation *including requests for appropriations.*

* * *

1500.12 *Legislative Actions*

(a) * * * *Agencies should prepare impact statements prior to submission of their legislative proposals to the Office of Management and Budget.* In this regard, agencies should identify types of repetitive legislation requiring environmental impact statements (such as cer-

This conclusion can be reached by comparing the Guidelines' use of "proposals for legislation" and their reference to "authorizations." In any event, the CEQ Guidelines were obviously basing the regulations on the terminology of the statute and—for the reasons hereinbefore outlined—this language does not equate requests for *appropriations* with proposals for *legislation.*

IV

Budget Requests as Proposals for Major Federal Action?

Appellees need not persuade that budget requests are "proposals for legislation" in order successfully to contend that such requests should be subject to the EIS requirement, if it can demonstrate that these requests should be considered as "proposals for major federal action." Common sense, however, mandates giving short shrift to this leg of appellees' argument. The NWRS in this case has not proposed any change in budget appropriations, but rather has merely initiated a routine, continuing request for funding. When such requests are made for the first time, thus commencing a new program, or conversely where a decision is made to request no funding at all, thus terminating a program, perhaps such action could plausibly be considered "major"; but I cannot agree that a routine, annual budget request within the existing legislative authorization, differing in no major degree from those submitted in the past, can credibly be deemed "a proposal for major federal action." Congress would never consider such action as "major," and it is the intendment of Congress that is controlling. The continua-

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tain types of bills affecting transportation policy or annual construction authorizations.)

Appellees' Brief, p. 22 (emphasis in brief except emphasis on "authorizations" added). The reference to "authorizations" is significant.

tion of annual funding—naturally reflecting, in the size of the request, the vicissitudes of economics and elections —works no change in the law. Far from being an example of "major federal action," it might more properly be considered the result of "federal inertia." As has been shown above in refuting the argument that a budget request is a proposal for legislation, supply has traditionally not been deemed to involve a change in the law. Although the CEQ's regulation, 40 C.F.R. § 1500.5 (a), stating that "action" includes "requests for appropriations" is entitled to considerable deference, I find no indication whatsoever that Congress meant to elevate normal annual supply concerns to the dignity of "proposals for . . . major federal actions." Accordingly, I disagree with the Council's interpretation of the scope of such term and find EIS requirements inapplicable to the annual budget requests of the NWRS which are the subject of this appeal.

V

Requiring an EIS on the Budget Requests and the Traditional Confidentiality of Such Requests

41 U.S.C. § 24 provides that "requests for . . . appropriations which are submitted to the Office of Management and Budget by the head of any department or establishment shall be prepared and submitted *as the President may determine* in accordance with the provisions of section 11 of this title . . ." This generally calls for various agencies submitting their requests to the President through the OMB. The President reviews all these requests, makes his own decision thereon and then consolidates them in the form of an annual budget which he transmits to Congress. In this connection, pursuant to the authority conferred upon him by the statute that such requests "be prepared and submitted *as the President may determine,*" (emphasis added) (*Id.*), the President has determined, *inter alia*:

> 3. *Restrictions on disclosure of agency estimates.* All budget estimates and supporting materials submitted to the Bureau of the Budget are privileged communications. Their confidential nature must be maintained, since they are the basic data and worksheets in the process by which the President resolves budget problems and arrives at conclusions with respect to his recommendations to the Congress. The head of each agency is responsible for preventing disclosure of information contained in such estimates and materials except on request in formal appropriation hearings and when requested by Members of the Congress in connection with their consideration of the budget after its transmittal.

Circular A-10, revised Jan. 18, 1964, Executive Office of the President, Bureau of the Budget, App. 225. The confidential status of such requests is a matter of long standing dating at least from the 1930's, App. 242, 243, and even after the President has considered budget requests from the various agencies and decided upon the budget he will submit to Congress, the nature and amounts of the appropriations he has determined to request are confidential and are not publicly released until the budget is actually transmitted to Congress. App. 231.

This confidentiality of budget requests until they are formally submitted to Congress by the President is irreconciliable with the appellees' position that these requests should be the subject of Environmental Impact Statements. Congress has been aware of the confidential nature of budget requests, and despite extensive recent legislation concerning the budget process [12] has at no

[12] Act of March 2, 1974, Pub. L. No. 93-250, 88 Stat. 11, amended § 207 of the Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20. The House Committee on Pub. L. No. 93-250 commented "the rest of section 207 deals with the functions of the Office [of Management and Budget], which were transferred to the President by Reorganization

time explicitly suggested that EISs should be filed covering such requests. Perhaps even more significantly, Congress when it so intended has specifically removed the confidentiality of the budget requests submitted by certain agencies. The Consumer Product Safety Commission and the Commodity Futures Trading Commission [13] are examples of agencies whose budget requests have lost the protection of confidentiality. Congress, however, refrained from taking such legislative action with respect to either the Department of the Interior or the OMB.

Moreover, the amendments Congress enacted to the Freedom of Information Act,[14] evince no intent to alter the confidential nature of the communications between the President and units within the Executive Office. The conference report on the 1974 amendments to the FOIA explicitly stated that the term "Executive Office of the President," from which disclosure could be required under the Act, "is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." It is quite true that, by statute, the OMB gives advice to the Congress as well as to the President,[15] so some of its activities would fall outside of the above

Plan No. 2 of 1970 and *which are not changed by the bill.*" H.R. No. 93-697, 1974 U.S. CODE CONG. & AD. NEWS 2779 (emphasis added).

[13] Consumer Products Safety Act, § 27(k)(1), 86 Stat. 1227, 15 U.S.C. § 2076(k)(1) (Supp. V, 1975); The Commodity Futures Trading Commission Act of 1974, § 101(3), 88 Stat. 1390-1391, & U.S.C. § 7(a) (Supp. V, 1975).

[14] 5 U.S.C. § 552(b)(3) and (5) (Supp. V, 1975) provide exemptions from disclosure for information "specifically exempted from disclosure by statute" and "certain inter-agency or intra-agency memorandums or letters," respectively.

[15] 31 U.S.C. § 20 (1970) provides that the OMB shall provide any appropriate committee of either house "such aid and information as it may request."

proviso in the conference committee report, but to the extent that "units" exist within OMB "whose sole function is to advise and assist the President," such activities could be within the proviso. In this connection, 5 C.F.R. § 1303.20(b) states that certain units of the OMB do indeed "solely advise and assist the President" and that among these units are those that provide advice and assistance with regard to "the formulation and preparation of the Federal budget." This regulation is entitled to deference.[16] In light of the compelling evidence referred to above that Congress intended budget requests to remain confidential, I would not require an EIS to be submitted with the annual budget request of the NWRS.

VI

OMB and NEPA Obligations

In considering whether the Office of Management and Budget is "required to develop procedures to fulfill its [alleged] NEPA obligations in connection with the Budget process" concerning the National Wildlife Refuge Service, it is my view that the present regulations of the Department of the Interior and its "procedures" [17] ade-

[16] Udall v. Tallman, 380 U.S. 1, 16 (1965).

[17] Section 516.4 of the Department of Interior Manual provides:

Responsibilities

A. The Assistant Secretary [of the Department of the Interior]—Program Policy * * *.

(4) Shall review and approve all bureau and office procedures for the preparation and utilization of environmental statements.

[SEC. 516.5] *Determination of major Federal actions requiring environmental statements.*

The following criteria are to be used in deciding whether a proposed action requires the preparation of an environmental statement:

[Continued]

quately comply with the requirements in that respect and therefore I dissent from the majority's holding that the OMB is required to take the action it commands.

Conclusion

In summary, I concur in the holding that the District Court committed error in rendering its declaratory rul-

[17] [Continued]

A. Types of Federal actions to be considered include, but are not limited to:

(1) Recommendations or favorable reports to the Congress relating to legislation, including appropriations.

Appellants' Brief 10-11.

The "Procedures for Preparation of 102(2)(C) Environmental Statements" which were distributed on November 8, 1974, by the Director of the Fish and Wildlife Service, Department of the Interior, "to be used Service-wide for the preparation of environmental statements" provide:

3.1 *Statements on Individual Actions.* * * * it is the responsibility of the Regional Director to determine whether an environmental statement is necessary for individual actions * * *.

3.2 *General (Generic or "Blanket")* Statements. * * * it is the responsibility of the Associate Director Research and Environment to determine whether a general environmental statement should be prepared for a service program or program element * * *.

* * * *

4.0 *Scope and Procedures*: NEPA directs Federal agencies * * * to include a detailed statement of environmental impacts in every recommendation or favorable report on, legislation or other major actions significantly affecting the quality of the human environment * * *.

* * * *

4.5 *Statements on Individual Actions.* Individual statements shall be prepared for individual actions which have significant impacts on the quality of the human environment, and which are not adequately covered in a general

ing that each annual budget request for the National Wildlife Refuge Service must be accompanied by an Environmental Impact Statement, but I disagree with this court's conclusion that the Secretary of the Interior is under any legal obligation to prepare a programmatic environmental statement on the NWRS program. As the court's opinion points out, it would be absurd to construe the Environmental Protection Act and its implementing regulations to require an EIS with each annual budget request. In my view it is even more absurd—and equally contrary to the language of the statute—to construe the law and the regulation as requiring that the Agency is under any "obligation" to produce the half-way measure of a "programmatic" environmental statement. For the reasons set forth above, I do not feel that an EIS is ever required at the clearly pre-decisional stage at which the OMB or an agency submits a mere appropriation request which has yet to be formally incorporated into the budget transmitted to Congress by the President. I thus conclude that the OMB is not required to establish any new procedures in order to comply with NEPA.

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statement. Examples of actions on which statements should usually be prepared include but are not limited to:

1. Legislation (See Section 4.6)

* * * *

4.6.1 *Administration Bills.* On draft *legislation* prepared by the Service an environmental impact statement will be prepared.

Appellants' Brief 1-12 (emphasis added). The record also indicates:

> . . . OMB also provides that during the legislative clearing process (when OMB solicits the opinions of one agency's *substantive legislative proposals* from other agencies) agencies must submit relevant and available EISs. (OMB Circular A-19, revised July 31, 1972, paragraph 7(d)(2) (App. 249) (App. 239-240). (Emphasis added.)

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1017

SIERRA CLUB, *et al.*, PLAINTIFFS,

v.

ROGERS C. B. MORTON, *et al.*, DEFENDANTS.

[Filed Jun. 6, 1975, James E. Davey, Clerk]

MEMORANDUM OPINION

This matter is before the Court on cross-motions for summary judgment. Plaintiffs claim that annual budget proposals for financing the National Wildlife Refuge System involve a "recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment . . ." under Section 102(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(c), and that the defendants are therefore required to issue a detailed statement on the environmental impact of such annual budget proposals. Defendants seek dismissal of the action on several grounds. The matter has been thoroughly briefed by both sides.

All the cases that have considered this precise issue, as well as the Council of Environmental Quality's regulations, hold that appropriation requests are

"proposals for legislation" within the meaning of NEPA.

In *Environmental Defense Fund* v. *T.V.A.*, 468 F.2d 1164, 1181 (6th Cir. 1972), the Court stated that the phrase "proposals for legislation" as used in NEPA embraces annual appropriations requests: "The same results obtain if we construe the phrase 'proposals for legislation' in Section 102(2)(c) as did the District Court to encompass annual appropriation requests. Under 31 U.S.C. 22, the head of each federal agency must prepare each year a request for regular, supplemental, or deficiency appropriations to be submitted to Congress by the President under 31 U.S.C. 11. Unquestionably, to construe these budgetary requests as proposals for legislation within the meaning of NEPA would facilitate Congress' expressed purpose of constant revision and reevaluation of ongoing projects." See also, *Scientists' Inst. for Pub. Info. Inc.* v. *Atomic Energy Com'n*, 481 F.2d 1079 (D.D.C. 1973); *Environmental Defense Fund* v. *Tennessee Valley Auth.*, 339 F. Supp. 806 (E.D. Tenn. 1972); *Sierra Club* v. *Froehlke*, 359 F. Supp. 1289 (S.D. Texas 1973).

Further, the Council on Environmental Quality (C.E.Q.), the agency established by NEPA to serve as a research and advisory body to the President, has published guidelines that track the statute and support plaintiffs' position. The Council's regulations provide for the preparation of an impact statement whenever an action is determined to be a major action significantly affecting the quality of the human

environment. 38 Fed. Reg. 20550 (1973), 40 C.F.R. 1500 *et seq.* "Actions" are interpreted to include "recommendations or favorable reports relating to legislation *including requests for appropriations.*" (emphasis added). 40 C.F.R. 1500.5. The C.E.Q. Guidelines are entitled to great weight, and constitute a persuasive interpretation of NEPA. *Environmental Defense Fund* v. *Tennessee Valley Auth.*, 468 F.2d 1164 (6th Cir. 1972). Moreover, the Department of Interior's regulations follow the C.E.Q. Guidelines by providing that impact statements should be prepared in connection with appropriation proposals. 36 Fed. Reg. 19342. Section 516.2.5.A provides:

> "A. Types of federal actions to be considered include, but are not limited to:
>
> (1) Recommendations or favorable reports to the Congress relating to legislation, including appropriations."

The Court therefore concludes that annual proposals for financing the National Wildlife Refuge System are proposals for legislation within NEPA.

The Court is also of the opinion that annual proposals for financing the Refuge System are major Federal actions which clearly have a significant effect on the environment. The statutory phrase "actions significantly affecting the quality of the environment" has been held to be "intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make

the quality of the environment a concern of every federal agency." *Natural Resources Defense Council, Inc.* v. *Morton*, C.A. No. 1983-73 (D.D.C. Dec. 30, 1974, J. Flannery). Taking into account the nature and size of the Refuge System (350 refuges containing about 30 million acres), and the amount of the Refuge System's budget (about $200 million annually), it is evident that the scope of such budget project is far broader in terms of environmental impact than that of other proposed federal actions discussed in impact statements, such as a single canal, *Environmental Defense Fund* v. *Corps of Engineers*, 2 ERC 1173 (D.D.C. 1971), or dam, *Environmental Defense Fund* v. *Corps of Eng. of U.S. Army*, 325 F. Supp. 749 (E.D. Ark. 1971).

It goes without saying that budget decisions have a direct bearing on how the Refuge System will be staffed, managed and maintained. We think it equally clear that when the important interrelationship between the Refuge System and the budget process is considered, the unmistakable conclusion is that both the environmental impact of budget decisions is significant and that the federal action involved is major.

Defendants would counter the thrust of the clear language of the statute and the cited decisions with a variety of contentions. We now deal with certain of them.

Defendants argue that it would be impractical, if not impossible, and administratively burdensome to prepare impact statements at the budget proposal stage. Defendants assert that final budget decisions

are made less than one month before the President submits his budget recommendations in December prior to the commencement of the new fiscal year in July and that most budget decisions are not undertaken until September. Thus, defendants contend, the budget of the Department of the Interior is developed in a very short time frame, i.e., about four months.

Several courts, in considering and rejecting administrative difficulty as a defense under NEPA, have emphasized that NEPA requires compliance to the fullest extent possible. In *Calvert Cliffs' Coord. Com.* v. *U.S. A.E. Com'n.*, 449 F.2d 1109 (D.D.C. 1971), the defendants argued that compliance with the Act would place an enormous burden on the agency. The Court noted that ". . . the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." (p. 1115) See also *Environmental Defense Fund* v. *T.V.A.*, 468 F.2d 1164 (6th Cir. 1972).

Nor does the Court believe that compliance with NEPA is impossible. Defendants would convey the mistaken impression that appropriation proposals are emergency measures taken in response to some unforeseen event. Yet, defendants know that they are required to submit an annual appropriation proposal to Congress. Defendants, in fact, concede that the budget process begins about twenty months before

the beginning of the fiscal year and some fifteen months before the budget proposal is submitted to Congress. There is thus no reason to delay preparation of the impact statement until September or December of each year when final budget decisions are made. If no final, definite budget is in existence prior to that time, defendants should, to the fullest extent possible, prepare an impact statement that considers the various alternatives available at that time.

The Court's conclusion that defendants need not wait until final budget decisions have been reached before preparing an impact statement also finds support in the case law. The courts are in agreement that "federal action" within NEPA covers "proposals" as well as final decisions. The concept of NEPA is that officials give thought to the consequences on the environment *before* a significant project is launched. Therefore, what is assessed is "proposed action, not a fait accompli." *City of Boston* v. *Volpe*, 464 F.2d 254 (1st Cir. 1972). Moreover, the courts have repeatedly held that an impact statement should be prepared at as early a stage as possible in the development of a proposal to ensure compliance with the Act. *Calvert Cliffs' Coord. Com.* v. *U.S. A.E. Com'n, supra.* For the foregoing reasons the Court is of the opinion that it is irrelevant that final budget decisions are presently made in a very short time frame. NEPA requires defendants to draft an impact statement as early as possible and in time to accompany "proposals" through the agency review process.

Nor does the Court believe that under the rationale of plaintiffs' argument "hundreds or thousands of annual environmental impact statements would have to be prepared . . ." (Defendants' Reply Memorandum, p. 23). NEPA only requires that impact statements be prepared on those legislative proposals and federal actions significantly affecting the environment. Appropriation proposals for most federal agencies would not appear to pose a threat to the environment and therefore no impact statement would be required. In any event, even as to those agencies whose operations do significantly affect the environment, only one impact statement is required for the appropriations proposal. When it is noted that the Department of Transportation prepared 196 impact statements in just the first six months of 1974, C.E.Q., Fifth Annual Report, p. 390 (1974), it is difficult to accept the contention that the cumulative impact of today's decision will impose an insurmountable burden.

Defendants also argue that the budget process is privileged until the President adopts the budget and presents it to the Congress. OMB Circular No. A-10. Defendants therefore maintain that an impact statement cannot be prepared and made public until after the President has transmitted the budget proposal to Congress. Defendants claim that budget information is privileged under the Freedom of Information Act (FOIA), exemption 5.

Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), covers "inter-agency or intra-agency memorandums

or letters which would not be available by law to a private party in litigation with the agency."

In *EPA* v. *Mink*, 410 U.S. 73 (1973), a landmark case in construing exemption 5, the court considered the legislative history of exemption 5 and concluded that "Congress intended to incorporate generally the recognized rule that confidential intra-agency advisory opinions . . . are privileged from inspection." The court noted that the exemption was intended to protect the deliberative or policy-making processes of government. Thus, for purposes of applying exemption 5, a distinction is drawn between "predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and post-decisional memoranda setting forth the reasons for an agency decision already made, which are not." *Renegotiation Board* v. *Grumman Aircraft*, U.S. Supreme Court (April 28, 1975) slip op. p. 15.

Appropriation proposals are a type of communication made after the budget decision has been made or the policy already adopted, and hence "their disclosure raises a negligible risk of denying to agency decision-makers the uninhibited advice which is so important to agency decisions." *NLRB* v. *Sears, Roebuck & Co.*, U.S. Supreme Court, (April 28, 1975) slip op. p. 17, fn. 19. Budget appropriation requests are thus the final product in the agency's decision-making process with regard to budgets, and as such, cannot be termed pre-decisional. Final decisions are

disclosable under the FOIA. Since budget appropriation requests are final and cannot be termed predecisional, the Court concludes that such appropriation requests, whether made by the Department of the Interior or the Office of Management and Budget, both of which are federal agencies, are not privileged from disclosure under exemption 5 of the FOIA. *A fortiori*, environmental impact statements accompanying budget requests, are also not protected from disclosure under exemption 5. Whether hardship or inconvenience may result, requests for relief should be addressed to the Congress, not to the courts.

Finally, defendants assert that their proposed programmatic statement will serve as the equivalent impact statement.

Defendants are preparing such a draft statement which will discuss the entire operation and administration of the Refuge System, including funding alternatives. The final programmatic statement is planned to be completed by November, 1975. Accordingly, defendants argue plaintiffs' complaint is premature and ask the Court to stay this case pending completion of the final programmatic statement.

Admittedly, the programmatic statement is designed to provide an overview of the Refuge System and will only secondarily emphasize the environmental impacts on the system of budget requests. Although the programmatic statement will serve as the foundation for subsequent environmental analyses and for supplemental impact statements, the statement will only be "periodically updated" with no definite time frame mentioned for revision.

Like the court in *Natural Resources Defense Council, Inc.* v. *Morton, supra,* we are convinced that the programmatic statement is "insufficient to fulfill the purpose defined for an impact statement." The programmatic statement is designed to consider the general long-range goals of the Refuge System whether or not such goals are being considered by defendants in developing appropriation proposals. The programmatic statement is thus directed at a different subject than the environmental impact statement and cannot serve as a substitute. "A programmatic statement may be very helpful in assessing recurring policy issues and insuring consideration of the cumulative impact that numerous decisions might have on the environment, but that does not mean that it will suffice to fulfill the NEPA mandate. The Court is convinced that the . . . programmatic statement alone, . . . does not permit the 'finely tuned and systematic balancing analysis' mandated by NEPA." *Natural Resources Defense Council, Inc.* v. *Morton, supra.*

For the foregoing reasons plaintiffs are granted summary judgment because there is no genuine issue as to any material facts, and the plaintiffs are entitled to judgment as a matter of law. An appropriate order has been entered.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

June 6, 1975

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil 74-1017

No. 75-1871

[Filed May 15, 1978]

SIERRA CLUB, et al., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of The Interior, and JAMES T. LYNN, Director of Office of Management and Budget, et al., APPELLANTS

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, LEVENTHAL and MACKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part and the case is remanded to

the District Court for further proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam for the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 15, 1978

Opinion for the Court filed by Circuit Judge Leventhal.

Opinion filed by Circuit Judge MacKinnon, concurring in part and dissenting in part.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1017

[Filed June 6, 1975]*

SIERRA CLUB, *et al.*, PLAINTIFFS,

v.

ROGERS C. B. MORTON, *et al.*, DEFENDANTS.

ORDER

This matter came before the Court on the parties' cross-motions for summary judgment, and defendants' alternative motion for a stay of proceedings, and the Court, having considered the parties' supporting memoranda of points and authorities and the exhibits, and having heard oral argument, it is hereby this 6th day of June, 1975,

ORDERED, that plaintiffs' motion for summary judgment for declaratory relief is granted on the grounds that the National Environmental Policy Act, 42 U.S.C. 4231, *et seq.* requires:

(1) Defendants to prepare, consider, and disseminate environmental impact statements on annual proposals for financing the National Wildlife Refuge System;

* The district court stamped this order as filed on May 6, 1975. The correct filing date was June 6, 1975.

(2) Defendant Director of the Office of Management and Budget to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated.

Since defendants have not prepared, considered, or disseminated environmental impact statements concerning their proposals for financing the National Wildlife Refuge System and defendant Director of the Office of Management and Budget has not developed the requisite formal methods and procedures, they are in violation of the National Environmental Policy Act and plaintiffs are entitled to declaratory relief; and it is further

ORDERED, that plaintiffs' motion for summary judgment for injunctive relief as to the defendants' violation of the National Environmental Policy Act be, and the same hereby is, granted; and it is further

ORDERED, that the motion of defendants for summary judgment be, and the same hereby is, denied; and it is further

ORDERED, that defendants' alternative motion for a stay of proceedings be, and the same hereby is, denied; and it is further

ORDERED, that this case is hereby dismissed.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, et al., PLAINTIFFS,

v.

ROY L. ASH, DEFENDANT.

Civil Action No. 1017-74

AFFIDAVIT OF DONALD E. CRABILL

DONALD E. CRABILL, being duly sworn, state that to the best of my knowledge and belief:

1. I am employed by the Office of Management and Budget (OMB) as a Deputy Associate Director. The Natural Resources Division of OMB, which I head consists of three Branches, one of which is the Interior Branch. This Branch is responsible for making recommendations to the Director of OMB in the preparation of the President's budget, the preparation of supplemental budget requests, the review of program and financial plans, the apportionment of appropriated funds, and other methods of budget control and program review for certain bureaus within the Department of the Interior, including the Fish and Wildlife Service. The Interior Branch consists of seven professional employees, including a Branch Chief. The examination and review of the Fish and Wildlife Service budget has been, and is now, one part of the assignment of a single budget examiner.

2. The budgetary process is the means by which the President and the Congress decide how available fiscal resources shall be allocated in a particular year to carry out programs and projects already approved.* To the extent that NEPA is applicable to such programs, it logically applies at the time the substantive legislation is proposed rather than at the time annual funding is requested or provided.

3. Most agencies begin their budget preparation at the field station level. At each higher level in the organization, the budget estimates and program levels are reviewed and revised based on successively broader viewpoints and considerations. The final stage of review is the Presidential level. The President has final executive responsibility for the Federal programs and the budget requests which finance them. From the national perspective, the President (utilizing OMB) must decide between the competitive and sometimes conflicting wants of the agencies, and recommend appropriations to meet national problems based upon his perception of required priorities. This involves review of all agency programs, literally thousands. Many programs are interrelated in that a decrease in one can be offset by an increase in a related one. Moreover, in a certain sense, all programs are interrelated since an increase in funding in one area must result in a decrease elsewhere since

* E.g., Migratory Bird Conservation Act, 16 U.S.C. 715-715s (1929); Fish and Wildlife Act of 1956, 16 U.S.C. 7429-742j; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd-668ee, supp. IV, 1965-1968.

resources are finite. Obviously, to quantify in detail the potential environmental consequences of every budget decision on every program (not to mention every funding option considered prior to the final funding decision) is an absolute impossibility, even disregarding the severe time limitations imposed on OMB (explained below).

4. The schedule for formulating the President's budget recommendations to Congress is outlined in the document "Major Steps in the Budgetary Process" * * *. The budget for the Department of the Interior (Interior), like that of other agencies, is developed in a very short time frame as indicated by that schedule. The time sequence, set forth in detail in OMB Circular A-11 * * * can be briefly described as follows: In mid-summer, a planning letter is sent to the Secretary of the Interior by the Director of OMB, containing tentative overall figures for Interior in order to guide its budgeting. * * * The Secretary of the Interior's recommendations to the President are transmitted via the Office of Management and Budget (OMB) in early October (October 2 for the 1976 fiscal year (FY 1976)). In the following few weeks, OMB staff, in consultation with Interior, examines Interior's estimated needs.

OMB staff then identifies the major areas in which changes in program policy or in funding policy will be required. Alternative courses of action and their effects are identified and discussed with the OMB Director at "Director's Review". During the end of November, after Director's Review has been com-

pleted, tentative recommendations to the President are determined by the Director of OMB, taking into account both the individual needs of Interior and the total set of priorities government-wide; these tentative budget recommendations are then informally "passed back" to Interior (on November 20 for FY 1976) for the consideration of the Secretary. This step is discretionary with the President and the Director of OMB; in some years it has been omitted.

In early December (December 2 for FY 1976), the Director of OMB presents budget alternatives for Interior to the President for his review and decision. Presidential decisions are communicated to the Secretary, and should he wish to disagree with them, a meeting between the President, the Secretary, and the Director of OMB is held at the discretion of the President to resolve differences. For FY 1976 there were no such disagreements as to the Fish and Wildlife Service budget.

This tight schedule for budget review from October to December is necessitated by several factors: first, prior to determining its needs for the upcoming fiscal year, an agency should know the actual figures for the past fiscal year to make more accurate assessments of budget needs. These figures for the preceding year are not usually available until September. Second, by law (31 U.S.C. Section 11) the President's Budget must be submitted during the first fifteen days of each regular session of Congress (i.e., middle or late January). Third, time must be allotted in January for the final printing of the Budget and

related documents. To prepare environmental analyses for each budgetary option considered for each program, to provide for public comment on such analyses and then to make new budget decisions is patently impossible within the time constraints imposed by the above factors. If complete details on environmental impacts were submitted to OMB during budget formulation, other equally important considerations (such as cost and benefits) could not be thoroughly evaluated due to a dearth of time and manpower. It should be added that under the recently enacted Congressional Budget Impoundment and Control Act of 1974 (P.L. 93-344) the fiscal year is altered, ending on September 30 rather than the present June 30. Therefore, it will become even more difficult to formulate a budget prior to January because complete figures on programs of the prior fiscal year will be unavailable until late in December.

5. Funding for the Wildlife Refuge System is not set forth as a discrete budgetary item within the relevant general category of the Fish and Wildlife Service (formerly the Bureau of Sport Fisheries and Wildlife). Operation of refuges is largely funded from a Treasury account entitled "Resource Management", one of several accounts from which the Fish and Wildlife Service is funded. This account is then subdivided into generic activities. * * *

Prior to FY 1974, Wildlife Refuges was a discrete activity within the Budget. At that time, however, two accounts were consolidated and the activity

structure was modified at the request of Interior. The Activity structure was changed in order to more efficiently budget for total programs conducted by the Fish and Wildlife Service, as opposed to budgeting based upon organizational units; that is, refuges, research, and other activities conducted by the Service are not ends in themselves, but contribute to the goal of improved management of wildlife resources. Thus, several of the activities now concern wildlife refuges. One such program activity, "Wildlife Resources", includes funds for all activities relating to wildlife, not just Refuges. Similarly, the activity "Interpretation and Recreation" includes funds not only for visitor recreation at Refuges, but for Fish Hatcheries also. Some funds for the Refuge System do not come from "Resource Management" but from "Construction and Anadromous Fish", a separate account for the Fish and Wildlife Service. Again, the "Construction" budget covers more than Refuges alone. When the 1971 budget was printed, the new activity structure was used, and the prior two fiscal years were shown on that basis. Other years were not translated to the new activity listing, making comparison of budget years before and after 1972 extremely difficult, if not impossible.

It should be noted that there are many possible ways of displaying information in the budget, and that no single way has been found that satisfies all potential uses, or potential users. Nevertheless a display is selected for support by agency accounting sys-

tems, and requests for alternative displays must be met by ad-hoc data collection and estimating exercises.

6. An agency's budget recommendations (referred to in paragraph 2, supra) describe briefly what programs are included in the appropriation level for the current year (the so-called "base amount"). Major emphasis is placed on the incremental changes and the justifications for these requested decreases or increases. (E.G., see page 26, Interior's fiscal year 1975 budget estimates for the Fish and Wildlife Service, Exhibit 5, prepared as directed by OMB Circular A-11 * * *.

Partly due to the severe time constraints for budgetary review, and partly due to the presumption that a program, once authorized by law will continue at least until legal authorization expires, budget figures are necessarily based on the previous years appropriations and often only the *changes* from the current year can be examined in depth. Consequently, the budget for a particular account affecting the rate, timing and intensity of an activity will ordinarily change incrementally, not radically. This describes the formulation of the budget category encompassing wildlife refuges.

7. Resource Management, the primary account from which Wildlife Refuge expenditures come, has shown incremental increases for the past few years. These increases are reflected in each of its "activities", save for a relatively minor exception in FY

1974.* Because Wildlife Refuges is not a separate account, these figures do not clearly establish that their funding has increased. However, an increase in the broad account is presumptive evidence of an increase in a major program (i.e., Wildlife Refuges) within that account.

8. After the President transmits his Budget to the Congress, the Appropriations Committees hold hearings on appropriations bills; these hearings are the traditional forum for public input into the budgetary process. Nevertheless, OMB officials do meet with interested individuals and groups at their initiative to discuss their budget priorities and programs. The correspondence between one of the plaintiffs and former Associate Director of OMB Frank

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*

Budget Authority
Resources Management
($ in Thousands)

	1972 [1]	1973 [1]	1974 [2]	1975 [2]	1976 [2]
	Actual	Actual	Actual	Estimate	Estimate
Hab. Pres.	8,553	11,520	12,058	16,658	21,058
Wld. res.	30,355	34,674	38,549	45,220	45,431
Fish res.	18,263	19,663	21,502	23,763	24,059
E.J	3,192	4,135	4,265	5,480	7,180
I&R	5,433	6,005	5,095	6,117	6,117
Admin.	2,760	3,227	3,462	3,888	4,015
Total	68,556	79,284	86,172	101,126	107,860

[1] Source, Budget Appendix, 1974, 1975.

[2] Source, Budge Appendix forthcoming for FY 1976.

It should be noted that the President's proposal for a minor decrease in funds for one activity was rejected by Congress, which added $250,000, thereby increasing all activity numbers.

Zarb following an invitation by OMB to meet and discuss the FY 1976 budget * * * is evidence of but one instance of OMB's desire to have public input in the budget process. The public is free to suggest and to justify its own set of program priorities to OMB officials.

Budgetary recommendations made by the agency heads to the President and by the Director of OMB to the President are treated as confidential information prior to the transmission of his recommended Budget to the Congress. (See OMB Circular A-10, * * *). Thus, specific figures are not revealed in discussions which OMB may hold with the public. However, once the budget recommendations of the President are transmitted to Congress, the proposed budget is a public document. It is distributed to the public, deposited in libraries, and available for sale. This document explains the major priorities (economic, social, environmental, and others) that the President recommends, and sets forth in detail the proposed uses of Federal moneys. This document, and additional more detailed material prepared by each agency, serves as a basic body of information on which interested parties can build a case for proposing changes to the Congress during their public hearings and deliberations on the president's recommendations. Even the hitherto confidential recommendations made by the agency head to the President may be revealed in the Appropriations Hearings process (see, e.g. Dept. of Interior (p. 24) Approp. Hearings, House Sub. Comm. on DOI and Related Agen-

cies Appropriations for 1975, Part 4, 93d Cong. 2d Sess. (1974)).

/s/ Donald E. Crabill
DONALD E. CRABILL

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

The foregoing affidavit was subscribed and sworn to before me on this 13th day of January, 1975.

/s/ Albert E. Brown
Notary Public
District of Columbia

My Commission expires May 31, 1979

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 74-1017

SIERRA CLUB, 1050 Mills Tower, 220 Bush Street, San Francisco, California 94104; NATIONAL PARKS AND CONSERVATION ASSOCIATION, 1701 18th Street, N.W., Washington, D.C.; and NATURAL RESOURCES DEFENSE COUNCIL, INC., 15 West 44th Street, New York, New York, PLAINTIFFS

v.

ROGERS C. B. MORTON, Secretary of the U. S. Department of the Interior; and ROY L. ASH, Director of the U. S. Office of Management and Budget, DEFENDANTS

AFFIDAVIT

ROYSTON C. HUGHES, having been first duly sworn, deposes and states:

1. That he is Assistant Secretary of the Interior for Program Development and Budget.

2. That the Office of the Assistant Secretary, Program Development and Budget, under the provisions of Part 110.1.5 of the Department of the Interior Manual, discharges certain duties of the Secretary of the Interior, and exercises authority over and coordinates Department-wide processes related to, *inter alia*, budget management, comprehensive planning,

policy analysis, and economic analyses of Departmental programs.

3. That there has been a consistent pattern in Departmental budgeting procedures for the past two fiscal years (FY 1975 and 1976); and that Secretary of the Interior Rogers Morton has indicated his intention to continue to use similar procedures.

4. That, regardless of what procedure the Department follows internally in the preparation of its budget proposals, in February of the year preceding the year when the budget request is to be submitted to Congress, the Secretary of the Interior initially receives, from the Director of the Office of Management and Budget, an overall planning figure representing that Office's tentative suggestion as to the appropriate level for the Departmental budget for that fiscal year.

5. That the Department's proposals, together with written justifications therefor, must be transmitted to the Office of Management and Budget by September 30 of the year preceding the year in which the requests are submitted to Congress.

6. That because of the time consumed in writing and printing the justifications sent to the Office of Management and Budget by mid-September must be decided upon by the Department no later than the end of August of the year preceding the year in which they are to be submitted to Congress.

7. That the procedure, which the Department of the Interior has followed with respect to fiscal year 1975 and fiscal year 1976, commenced in February of the year preceding the year in which the Budget

requests are to be submitted to Congress, with Secretary Morton analyzing the figure suggested him by the Office of Management and Budget in February and then suggesting to each of his Assistant Secretaries general policy planning guidance and target budget amounts for each bureau in their respective areas of responsibility; and that, in addition, the Secretary at this time requested each of his Assistant Secretaries to prepare a "Program Strategy Paper" which would address Departmental priorities and policy guidance and would indicate the general manner in which the Assistant Secretaries intended to meet the tentative target budget amounts.

8. That the Secretarial actions discussed in paragraph 7 took place in March of the year preceding the year in which the budget requests were to be submitted to Congress; and that the Assistant Secretaries were requested to submit their "Program Strategy Papers" no later than mid-May of the same year.

9. That, following receipt by the Secretary of the Interior of the Assistant Secretaries' "Program Strategy Papers" * * * in mid-May, the Office of the Assistant Secretary for Program Development and Budget, in coordination with the appropriate Assistant Secretaries, prepared a series of "Secretarial Issue Papers" * * * which reviewed and analyzed the choices and issues presented by the limitations implicit in the Secretarially allocated target budget amounts.

10. That the "Secretarial Issue Papers" mentioned in the preceding paragraph were completed by early July of the year preceding the year in which the budget requests were submitted to Congress.

11. That, upon completion of the "Secretarial Issue Papers" the Secretary proceeded, in July, to hold a series of budget conferences with his Assistant Secretaries and the heads of the Department's bureaus and offices, including the Director of the United States Fish and Wildlife Service, to discuss the priorities and issues which were presented by each Assistant Secretary's "Strategy Papers."

12. That, on the basis of these conferences, the Secretary, in the first week of August, sent to each of his Assistant Secretaries a new tentative allocation of the Department's budget, noting that these allocations could be appealed until mid-August.

13. That, on the basis of the entire foregoing process, including any appeals filed, final decisions by the Secretary as to the allocations which the Department would recommend to the Office of Management and Budget were completed by the end of August; that these decisions were transmitted to the responsible Assistant Secretaries when they were made, with the instruction that the Assistant Secretaries, bureaus and offices, should prepare, by the end of the first week in September, draft budget estimates and, reflective of the decisions, justifications.

14. That, the draft budget estimates and justifications were, when prepared, sent to the Department's

Office of Budget, which had approximately five days to review the documents prior to their being printed.

15. That, after printing, the entire budget submission for the Department of the Interior * * * was transmitted to the Office of Management and Budget for review on approximately the last day of September.

16. Following the transmission of the budget documents to the Office of Management and Budget, the personnel of the Department of the Interior and of the Office of Management and Budget with responsibilities in specific program areas conferred as to the proposed budget allowances and justifications.

17. That, following the conferences noted in the preceding paragraph, the Office of Management and Budget transmitted to the Department of the Interior, in late November or early December, the budget allowance for each Bureau and Office which were to be transmitted to Congress as part of the President's budget.

18. That in the several weeks following the transmission noted in the preceding paragraph, the Secretary of the Interior, using the recommendations of his Assistant Secretaries, had the opportunity to appeal the budget allowances transmitted by the Office of Management and Budget; and that by the end of December all budget allowances were finalized, and requests and justifications were prepared for transmission to Congress in mid-January.

19. That prior to the budgeting process for fiscal year 1975, the Department of the Interior operated

within the basic March through August timeframe discussed in various paragraphs above, but used budgeting and reviewing procedures different from those employed in fiscal years 1975 and 1976.

20. That, because decisions as to the Departmental budget are not tentatively made until early December, are not finally made until late December, and are transmitted to Congress in mid-January, and because both during the year before and the month after those decisions are made the budgeting process travels, under extreme time pressure, between different levels of the Department's and Executive Branch's organization, the compilation of an environmental impact statement, on an annual basis, covering such requests, and the circulation of such a statement within the frameworks established by the Guidelines of the Council on Environmental Quality, would be extremely disruptive of the Department's budgeting processes.

ROYSTON C. HUGHES
Assistant Secretary, Program
Development and Budget
U.S. Department of the Interior

Subscribed and sworn to before me, a Notary Public for the District of Columbia, this —— day of January, 1974.

_____

Notary Public

My Commission expires: _____

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 274255 130

A MOTION TO DISPENSE
WITH THE PRINTING OF THE APPENDIX
WAS MADE AND GRANTED.

Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

No. 78-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, Secretary of the Interior, and JAMES T. McINTYRE, JR., Director, Office of Management and Budget,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, Secretary of the Interior, and JAMES T. MCINTYRE, JR., Director, Office of Management and Budget,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] A, pp. 1a-48a) is reported at 581 F.2d 895. The opinion of the district court (Pet. App. B, pp. 49a-58a) is reported at 395 F.Supp. 1187.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, pp. 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari until October 12, 1978.

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[1] "Pet." and "Pet. App." refer to the petition for a writ of certiorari and to the Appendix to that petition, respectively.

The petition for a writ of certiorari was filed on October 12, 1978. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1). Pet. 2.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly decided that Section 102(2)(C) of the National Environmental Policy Act requires the preparation of environmental impact statements on budget requests of federal agencies on the ground that they are proposals for legislation if the requests include new action significantly changing the status quo or propose a programmatic course based upon a programmatic review.

2. Whether the court of appeals correctly decided that the Office of Management and Budget is required by Section 102(2)(B) of the National Environmental Policy Act, which applies to all federal agencies, to issue methods and procedures which will identify the budget requests requiring an environmental impact statement.

STATUTES INVOLVED

The relevant provisions of the Budget and Accounting Act of 1921, 31 U.S.C. 1, *et seq.*, are set out at Pet. 3-4. The relevant provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.*, are set out at Pet. 5.

STATEMENT

1. Section 201(a) of the Budget and Accounting Act of 1921, 30 U.S.C. 11(a), provides that "[t]he President shall transmit to Congress during the first fifteen days of each regular session, the Budget * * *." Under Section 201(a)(5), 30 U.S.C. 11(a)(5), the Budget is to include the "estimated expenditures and proposed appropriations

necessary in his judgment for the support of the Government for the ensuing fiscal year * * *."

Preparation of the Budget is the responsibility of the Office of Management and Budget (OMB), which is an independent office in the Executive Office of the President (see Executive Order 11541, 35 Fed. Reg. 10737 (1970)). Section 207 of the Budget and Accounting Act, 31 U.S.C. 16, provides that "[t]he Office [of Management and Budget], under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments." Section 215 of the Act, 30 U.S.C. 23, directs the head of each department and establishment to "submit his requests for appropriations to the Office of Management and Budget on or before a date which the President shall determine."

To fulfill its responsibility to prepare the Budget, OMB forwards to the various departments overall budget figures to guide their budgeting. See Pet. App. E, p. 65a; Pet. App. F, p. 74a. Agency budget recommendations are then forwarded to OMB which reviews them. See Pet. App. E, p. 65a. OMB staff identifies areas where changes in program policy or funding policy are required and, on the basis of these changes, establishes "[a]lternative courses of action and their effects" which are discussed with the Director of OMB. Pet. App. E, p. 65a. The Director then forwards budget alternatives to the President. See *id.* at 66a; Pet. App. F, p. 77a. The President determines which alternatives to place in the Budget and, after informing the department heads of his decisions, forwards his recommended Budget to Congress. *Ibid.*

2. In their complaint, respondents challenged the failure of the Department of the Interior and OMB to prepare

an environmental impact statement (EIS) on their annual budget proposals for the National Wildlife Refuge System. Respondents contended that those proposals are both "recommendation[s] or report[s] on proposal[s] for legislation" and "other major federal action[s]" which significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C).[2] Respondents also contended that Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), which requires agencies to identify and establish procedures to insure that environmental values are given appropriate consideration in decisionmaking, required OMB to establish procedures to assure that budget proposals significantly affecting the quality of the human environment would be accompanied in the budget process by an environmental statement.

3. The district court granted summary judgment for respondents. It held that annual proposals for financing the National Wildlife Refuge System are both "proposals for legislation within NEPA" and "major Federal actions which clearly have a significant effect on the environment." Pet. App. B, p. 51a. The court therefore declared that NEPA required the petitioners to "prepare, consider, and disseminate environmental impact statements on annual proposals for financing the National Wildlife Refuge

[2] Respondents did not argue that both the Department of the Interior and OMB had to prepare an environmental statement. Rather, they contended that, as in other situations where more than one federal agency proposes or is involved in an environmentally signigcant action, one of the petitioners was required to assume the role of the lead agency and thereby the major responsibility for the preparation of the statement. See the Council on Environmental Quality (CEQ) regulations and guidelines on NEPA 40 C.F.R. 1501.5 (43 Fed. Reg. 55992, November 29, 1978); 40 C.F.R. 1500.5(a)(1), 1500.7(b) (1977). Respondents suggested that here the Department of the Interior would be the likely lead agency and thus would prepare the environmental statement which would be considered by OMB and the President and ultimately transmitted to Congress with the President's Budget.

System."[3] Pet. App. D, p. 61a. In addition, the district court declared that NEPA require OMB to "develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated." *Id.* at 62a.

4. The court of appeals reversed the district court's judgment which required petitioners to prepare an environmental impact statement each year on the operations of the National Wildlife Refuge System. Pet. App. A, p. 23a. Although the court held that petitioners' requests for appropriations for the Refuge System were "proposal[s] for legislation" under Section 102(2)(C) of NEPA (*id.* at 14a, 18a), it concluded that an environmental statement was not required each year on those proposals. Instead, it narrowly defined two situations in which NEPA required the preparation of an EIS on agency budget proposals: where a proposal calls for "taking new action which significantly changes the status quo * * *" and where a proposal "ushers in a considered programmatic course following a programmatic review."[4] *Id.* at 17a.

[3] After respondents filed their complaint in the district court, the Department of the Interior decided to prepare an enviornmental impact statement on "the entire operation and administration of the Refuge System, including funding alternatives." Pet. App. B, p. 57a. However, the district court held that that statement did not satisfy petitioners' obligation under NEPA to prepare an annual environmental impact statement on the budget proposals for the Refuge System since it principally provided "an overview of the Refuge System and will only secondarily emphasize the environmental impacts * * * of the budget requests" and would not be regularly updated. *Ibid.*

[4] In light of the EIS which the Department of Interior had prepared, the court ruled that the Department had no further obligations under NEPA at that time. *Id.* at 23a.

The court of appeals affirmed the district court's declaratory judgment that, under Section 102(2)(B) of NEPA, OMB was required to develop methods and procedures which would identify agency requests for appropriations that require an environmental impact statement. Pet. App. A, p. 20a. It required OMB to review its current procedures governing the budget process and "to revise them if necessary to conform to its views of what NEPA requires, consistently with this opinion." *Id.* at 21a n.37. In this regard, the court emphasized that "OMB will have latitude to develop methods and procedures that harmonize both NEPA and budget processes." *Id.* at 23a.

REASONS FOR DENYING THE WRIT

1. Petitioners seriously exaggerate the novelty and importance of the decision below.

Contrary to petitioners' assertion (Pet. 15), the court of appeals' decision is not the "first significant judicial intervention in the processes of the Executive Branch that culminate in the President's annual submission of his Budget to Congress." In at least three earlier cases, courts have held that agency budget requests are "proposals for legislation" under Section 102(2)(C) of NEPA. *Scientists' Institute for Public Information* v. *AEC*, 481 F.2d 1079, 1088 (C.A.D.C. 1973); *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1182-1184 (C.A. 6, 1972); *Aluli* v. *Brown*, 437 F. Supp. 602, 606-607 (D. Haw. 1977), appeal pending. The court of appeals' decision therefore is merely another in a line of decisions holding that NEPA requires the preparation of environmental impact statements on agency requests for appropriations which significantly affect the human environment.[5]

[5] Even if a budget request does not constitute a "proposal for legislation," as the dissent below concluded (see Pet. App. A, p. 30a-42a), an EIS would still have to be prepared, as the district court held (Pet. App. B, p. 51a), whenever the request "significantly affect[s] the quality of the human environment" since Section 102(2)(C) of NEPA applies not only to "proposals for legislation" but also to "other major Federal actions."

In addition, contrary to petitioners' argument (Pet. 15), the court of appeals' decision will not result in any appreciable, let alone "significant," judicial intervention in the budget process. The court's decision narrowly defines the situations in which an environmental impact statement is required on an agency budget proposal. An EIS is required only where an agency's proposal involves new action which significantly changes the status quo of an existing program or where an agency has carried out a review of a program and has determined the course the program is to take in the future. Pet. App. A, p. 17a. The court observed that environmental statements on budget proposals would, under the principles it established, be required "in relatively few instances." *Id.* at 22a.

Moreover, even if environmental impact statements are not required on the budget proposals identified in the court of appeals' decision, EISs on the proposals will often be nonetheless required at a later time on the actions underlying the budget proposals. For instance, in the case of a proposal to alter significantly the status quo of an agency program, an EIS will be required after the agency obtains appropriations from Congress when it decides whether to undertake the action that was proposed in its budget request. At that time, the agency's proposal to alter the status quo in an environmentally-significant manner would constitute a proposal for a "major Federal action" under Section 102(2)(C) and an EIS would have to be prepared. Similarly, in the case of an agency review of a program which significantly affects the human environment, an EIS would be required

on the agency's new, post-review "programmatic course" (see Pet. App. A, p. 17a).[6] And an environmental statement would be required whenever the agency seeks new authorization for the program from Congress.[7]

Consequently, the court of appeals' decision does not impose any substantial burden. It primarily affects the time at which environmental impact statements on certain proposed actions are to be prepared. Under the court's decision, statements on a narrow class of environmentally-significant proposed actions are to be prepared during the budget process, rather than after the agency obtains appropriations when it decides whether to undertake the action. The decision thus allows the environmental effects of a small number of proposed agency actions to be considered not only by the various components of the Executive Branch which are involved in the budget process but also by Congress in its budget deliberations. This, we submit, is entirely consistent with the NEPA requirement that the environmental consequences of proposed agency actions be considered "at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs." *Calvert*

[6] The Department of the Interior prepared on environmental impact statement in precisely this situation when it prepared an EIS in conjunction with its programmatic review of the National Wildlife Refuge System. See note 3, *supra*.

[7] Judge MacKinnon, in dissenting from the majority opinion below, recognized that NEPA requires impact statements on agency proposals for "legislation authorizing appropriations, *i.e.*, [for] alterations in the existing law * * *." Pet. App. A, pp. 41a-42a. Courts have held that NEPA requires environmental statements on proposals for legislation, other than for appropriations, which significantly affect the environment. *E.g.*, *Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 450 (C.A.D.C. 1977); *Atchison, Topeka, and Santa Fe Ry.* v. *Callaway*, 431 F. Supp. 722, 725 (D.D.C. 1977).

Cliffs' Coordinating Committee, Inc. v. *AEC*, 449 F.2d 1109, 1118 (C.A.D.C. 1971).

2. There is no conflict among the courts which have considered whether NEPA requires the preparation of environmental impact statements on requests for appropriations which significantly affect the quality of the human environment. As we have seen above, all three courts, in addition to the courts below, which have considered this question have held that agency appropriation requests which propose activities having significant effects on the human environment are "proposal[s] for legislation" under NEPA that require the preparation of environmental statements. No court has held to the contrary.[8]

3. The court of appeals' holding that agency requests and recommendations for appropriations, including those of OMB, are "proposals" for legislation is fully consistent with the language of Section 102(2)(C), this Court's decisions interpreting NEPA, and the Act's legislative history. Section 102(2)(C) requires all federal agencies to "include in every recommendation or report on proposals for legislation * * * significantly affecting the quality of the human environment, a detailed [environmental impact] statement * * *." It does not require an EIS only on agency legislative proposals which represent the final proposal of the Executive Branch. Rather, an EIS is required on any such proposal which would significantly affect the environment, irrespective of the entity to which it is forwarded or which makes a final determination on

[8] Petitioners cite (Pet. 15 n.11) *Sierra Club* v. *Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976), and *National Wildlife Federation* v. *United States*, Civil No. 78-1039 (D.D.C. July 20, 1978), appeal pending, for the proposition that "courts have refused to impose procedural conditions on reporting or disclosure requirements on the budget-making process." However, neither case involved NEPA and its explicit requirement that all federal agencies prepare environmental impact statements on proposals for legislation having significant environmental effect.

it.[9] Thus, despite the fact in this case that the Department of the Interior's budget proposals are forwarded to OMB and OMB's proposals are subject to the review of the President, both the Department and OMB are agencies whose recommendations for appropriations are, under Section 102(2)(C), "proposals" for legislation.[10]

Contrary to petitioners assertion (Pet. 17), this conclusion is in no way inconsistent with the decisions of this Court interpreting NEPA. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 399, 401-402 (1976), this Court held that Section 102(2)(C) requires an environmental impact statement only on actual proposals for legislation or other

[9] The court of appeals properly rejected the contention now made by Petitioners (see Pet. 16-18) that agency budget proposals are not "proposals" for legislation under Section 102(2)(C) because they do not constitute the Executive Branch's final budget proposal (Pet. App. A, p. 22a):

> Certainly the fact that a proposal is subject to further review by the Executive is no bar to NEPA's requirement for an environmental statement. On the contrary, NEPA calls for an EIS precisely so that environmental consequences may be taken into account before a final decision is reached by the Executive official or agency.

The CEQ regulations and guidelines on NEPA have consistently recognized that an agency's proposal for legislation or other major action is a "proposal" under Section 102(2)(C) even though a final decision on it is to be made by another agency. See 40 C.F.R. 1501.5 (43 Fed. Reg. 55992; November 28, 1978); 40 C.F.R. 1500.7 (b) (1977).

[10] OMB is clearly an "agency" under Section 102(2)(C) of NEPA when performing its duties in the budget process. Congress has specifically charged OMB with the responsibility of preparing the Budget. Section 207 of the Budget and Accounting Act, 31 U.S.C. 16. Consequently, in the budget process, OMB does not perform merely as staff to the President. It therefore is an agency under the Administrative Procedure Act and the Freedom of Information Act. See *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C. 1971); *Gulf Oil Corp.* v. *Hickel*, 303 F. Supp. 31 (D.D.C. 1969), affirmed, 435 F.2d 440 (C.A.D.C. 1970); *Guadamuz* v. *Ash*, 368 F. Supp. 1233 (D.D.C. 1973); *Amalgamated Meat Cutters & Butcher Workers* v. *Connelly*, 337 F. Supp. 737 (D.D.C. 1971). And there is no evidence in the legislative history of NEPA that Congress intended OMB to be treated otherwise under that Act.

federal action. Thus, this Court ruled that where an agency has not formulated a proposal or is merely contemplating whether to do so, Section 102(2)(C) is inapplicable. 426 U.S. at 406. However, when an agency submits budget recommendations to OMB, it is not merely contemplating a proposal. To the contrary, the recommendations represent the agency's final position on a proposal for legislation after months of detailed analysis and review. See Pet. App. F, pp. 74a-77a.

If agency budget proposals are not "proposal[s]" for legislation under Section 102(2)(C) because they do not constitute the Executive Branch's final proposal to Congress, then any agency proposal for environmentally-significant legislation would be exempt from NEPA whenever the final proposal was submitted to Congress by the President. However, there is nothing in NEPA or its legislative history to indicate that Congress, after specifically providing that legislative proposals were to be covered, intended such a broad exemption from the requirements of Section 102(2)(C). In addition, the CEQ regulations provide that, in determining whether a proposal for legislation is a "proposal" under Section 102(2)(C), the controlling factor is not the entity which ultimately submits the proposal to Congress but the role of the federal agencies in developing it. 40 C.F.R. 1508.17 (43 Fed. Reg. 56004, November 29, 1978). If a proposal is developed by or with the significant cooperation and support of a federal agency, it is a "proposal for legislation" under Section 102(2)(C), regardless of the entity which transmits it to Congress. *Ibid.*[11]

[11] The CEQ guidelines on NEPA provide that agency requests for appropriations were proposals for legislation under Section 102(2)(C). 40 C.F.R. 1500.5(a) (1977). That interpretation of CEQ, the agency charged with administering and implementing NEPA, is of course entitled to great weight (*Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)), particularly since it was made soon after the enactment of NEPA (*Power Reactor Development Co.* v. *International*

4. There is absolutely no evidence in the legislative history of NEPA that Congress intended to exclude appropriations from the term "legislation" in Section 102 (2) (C). None of the courts which has addressed the question whether NEPA requires environmental impact statements on an agency budget proposal has concluded that Congress intended to distinguish between "appropriations" and "legislation" in Section 102(2) (C). As then Judge McCree stated for the Sixth Circuit in *Environmental Defense Fund* v. *TVA*, *supra*, 468 F.2d at 1181:

> Appellants claim * * * that there is a distinction between "legislation" and annual appropriations for purposes of construing section 102(2) (C). They urge that the former refers to a change in existing law but the latter constitutes merely a routine authorization to disburse funds[,] * * * that the standing rules of both the House of Representatives and the Senate embody this distinction and that it can be assumed that Congress was aware of the distinction when it approved the use of the word "legislation" in section 102(2) (C). * * *
>
> We find this contention unconvincing. * * *. More significantly, the Congress may have valid reasons for distinguishing between "legislation" and "appropriations" for purposes of determining procedural

Union of Electricians, 367 U.S. 396, 408 (1961)). The new CEQ regulations provide that requests for appropriations are not proposals for legislation under Section 102(2)(C). 40 C.F.R. 1508.17 (43 Fed. Reg. 56004, November 29, 1978). In support of its change in position, CEQ merely referred to "traditional concepts relating to appropriations and budget cycle" and "considerations of timing and confidentiality" and concluded that "[q]uite simply, the Council in its experience found that preparation of EISs is illsuited to the budget preparation process." 43 Fed. Reg. 55989 (November 29, 1978). But what CEQ considers unwise or impractical is of little relevance to the question whether Congress intended agency requests for appropriations to be proposals for legislation and, where significantly affecting the environment, to be accompanied by an EIS.

> matters such as deciding the proper committee to which to refer a bill or the time or duration of legislative debate. But that does not require us to close our eyes to the commonly accepted meaning of the word "legislation"—the making or giving of laws—or to the clearly expressed congressional purpose of NEPA.

5. Petitioners rely heavily (see Pet. 18-20) on the contention that Congress intends the budget process to be confidential. However, Section 206 of the Budget and Accounting Act, 31 U.S.C. 15, merely instructs agencies not "to submit to Congress or any committee thereof" any estimate or request for appropriations unless requested by either House of Congress. Congress has not restricted the disclosure of agency budget requests in any other fashion.[12]

Even if Congress intended Section 206 of the Budget and Accounting Act to establish a general rule of confidentiality governing agency budget proposals, this would not support a general exemption of those proposals from the requirements of NEPA. To the contrary, in Section 102(2) (C) Congress required all agencies, "to the fullest extent possible," to prepare environmental impact statements on environmentally-significant proposals for legislation. Numerous courts, including this Court, have held that, in requiring agencies to comply with NEPA "to the

[12] OMB Circular A-10 requires that agencies not disclose their budget requests prior to the submission of the Budget to Congress. However, there is no evidence that in enacting NEPA, Congress intended OMB's policy of confidentiality to negate the clear mandate of NEPA that agency proposals which significantly affect the environment be fully analyzed and publicly disclosed before final decisions are made. Moreover, the courts have held consistently that EISs are required on such proposals, despite inconsistent policies or practices of federal agencies. *E.g.*, *Calvert Cliffs' Coordinating Comm., Inc.* v. *AEC*, *supra*; *Silva* v. *Romney*, 473 F.2d 287 (C.A. 1, 1973); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244 (C.A. 8, 1974).

fullest extent possible," Congress intended to excuse agency compliance only where there exists a direct and unavoidable statutory conflict. *E.g., Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-788 (1976); *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, *supra*, 449 F.2d at 1114, 1115 n.12; *Louisiana* v. *FPC*, 503 F.2d 844, 874 (C.A. 5, 1974); *Davis* v. *Morton*, 469 F.2d 593, 598 (C.A. 10, 1972).

Here, there is no statutory conflict between Section 206 of the Budget and Accounting Act and Section 102(2)(C) of NEPA even if Section 206 is construed as establishing a broad rule of confidentiality. The environmental impact statement on a budget proposal need not contain the figures which the agency is forwarding to OMB or that OMB is recommending to the President. Rather, the statement need only consider, as the court of appeals stated (Pet. App. A, p. 22a), various alternative budget figures and the environmental impacts of each.[13] Alternatively, a statement may be prepared on an agency's budget proposal and considered in the budget formulation process by the agency, OMB and the White House, but not be released to the public until the President transmits the final Budget to Congress.[14] In any event, the preparation of environmental impact statements on agency budget proposals clearly does not require the publication

[13] This is precisely the approach which was taken in the 1976 EIS prepared by the Department of the Interior on the National Wildlife Refuge System. It examined the environmental effects of managing the System over a ten-year period at various levels of appropriations. It did not disclose any budget proposals made by the Department to OMB or by OMB to the President.

[14] The new CEQ regulations provide that agencies need only prepare draft environmental statements on legislative proposals and that those statements are to be released to the public at the time the legislative proposal is sent to Congress or within 30 days thereafter. 40 C.F.R. 1506.8 (43 Fed. Reg. 56001-56002, November 29, 1978).

of the figures set forth in the proposals or otherwise compromise the alleged confidentiality of the budget process.

6. The court of appeals concluded that OMB, "as the key agency in the executive's budget formulation process," is required to provide guidance to other agencies in determining when an environmental statement is required on budget proposals. Pet. App. A, pp. 20a-22a. That conclusion is entirely warranted.

Section 102(2)(B) directs all agencies of the federal government to "develop methods and procedures which will insure that presently unquantifiable environmental amenities and values be given appropriate consideration in decisionmaking along with economic and technical consideration." The fact that Section 102(2)(C) requires environmental impact statements on agency proposals to be prepared by a responsible official of the agency making the proposal certainly does not, as petitioners argue (See Pet. 24-25), show that methods and procedures issued pursuant to Section 102(2)(B) are to be restricted to the agency that issues them. To the contrary, Section 102(2)(B) is independent of Section 102(2)(C). See *Hanly* v. *Kleindienst*, 471 F.2d 823, 834-835 (C.A. 2, 1972), certiorari denied, 412 U.S. 908 (1973). And, on its face, it does not even suggest that the methods and procedures that are developed pursuant to it are only to be applicable to the agency developing them.

Indeed, it is perfectly reasonable for OMB to prepare the guidelines called for by the court of appeals' decision. It is the agency primarily responsible for gathering budget proposals and other information from the various agencies and for preparing the Budget. See Section 207 of the Budget and Accounting Act, 31 U.S.C. 16. In fulfilling these responsibilities, it already has issued numerous regulations instructing the agencies how to proceed in the budget process. See OMB Circulars Nos. A-10 and

A-11. OMB therefore is clearly the logical agency to develop regulations implementing the court's decision.

Finally, it should be noted that the CEQ guidelines provide that OMB would perform the very role that the court of appeals directed it to assume. 40 C.F.R. 1500.12 (1977) provided that CEQ and "the Office of Management and Budget will cooperate in giving guidance as needed to assist agencies in identifying legislative items believed to have environmental significance." To our knowledge, OMB has never opposed CEQ's authority to issue this guideline or its responsibility to provide guidance to other agencies regarding their NEPA obligations.[15]

[15] While not including the issue as one of the questions presented, petitioners suggest (Pet. 26-27) that respondents lacked standing to challenge the failure of OMB to issue regulations and guidance under Section 102(2)(B). We note that, although petitioners raised other questions concerning standing below—questions which they now concede (Pet. 25-26)—they have never previously raised this issue. In any event, the injury to respondents from OMB's unlawful failure to issue regulations and guidance under Section 102(2)(B) "fairly can be traced to the challenged action" of OMB and is not "purely speculative." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42, 43 (1976). If OMB had promulgated the regulations required by Section 102(2)(B) regarding the preparation of EISs, there can be little doubt that the Department of the Interior would have complied with them and prepared an EIS on its budget proposals. Indeed, the Department would have been under a legal obligation to do so. Thus, this is not a situation like *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* or *Warth* v. *Seldin*, 422 U.S. 490 (1975), where there was serious doubt whether the private parties who were actually inflicting the injuries on the plaintiffs and who were not before the court would alter their practices if the relief requested against the defendants were granted.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, PETITIONERS

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 581 F.2d 895. The opinion of the district court (Pet. App. 49a-58a) is reported at 395 F. Supp. 1187.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time with-

in which to file a petition for a writ of certiorari to and including October 12, 1978, and the petition was filed on that date. The petition was granted on January 8, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether annual budget requests by federal agencies to the Office of Management and Budget (OMB) and recommendations by OMB to the President, concerning items to be included in the President's Budget for the support of previously enacted federal programs affecting the environment, constitute "proposals for legislation" significantly affecting the quality of the human environment so as to require preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

2. Whether Section 102(2)(B) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(B), imposes judicially enforceable obligations on the Office of Management and Budget to adopt procedures and regulations to identify agency requests that must be accompanied by environmental impact statements.

STATUTES AND REGULATIONS INVOLVED

1. Budget and Accounting Act, 1921, As Amended

Sections 2, 201(a)(5), 206, 207, 215, and 216(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 2, 11(a)(5), 15, 16, 23, and 24(a), provide in part:

SEC. 2. When used in this Act—

The terms "department and establishment" and "department or establishment" mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including any independent regulatory commission or board and the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States; * * *.

SEC. 201. (a) The President shall transmit to Congress during the first fifteen days of each regular session, the Budget * * *. The Budget shall set forth in such form and detail as the President may determine—

* * * * *

(5) estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year, and projections for the four fiscal years immediately following the ensuing fiscal year * * *.

* * * * *

SEC. 206. No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request, and no recommendation as to how the revenue needs of the Government should be met, shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress.

SEC. 207. * * * The [Office of Management and Budget], under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments.

SEC. 215. The head of each department and establishment shall submit his requests for appropriations to the Office of Management and Budget on or before a date which the President shall determine. In case of his failure to do so, the President shall cause such requests to be prepared as are necessary to enable him to include such requests with the Budget in respect to the work of such department or establishment.

SEC. 216. (a) Requests for regular, supplemental, or deficiency appropriations which are submitted to the Office of Management and Budget by the head of any department or establishment shall be prepared and submitted as the President may determine in accordance with the provisions of section 201.

2. National Environmental Policy Act of 1969

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides in part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement by the responsible official * * *.

3. Regulations of the Council on Environmental Quality

Sections 1508.12 and 1508.17 of Title 40, Code of Federal Regulations, as adopted by the Council on Environmental Quality on November 29, 1978, state in part (43 Fed. Reg. 55978, 56004):

> § *1508.12 Federal agency.*
>
> "Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office * * *.
>
> * * * * *
>
> § *1508.17 Legislation.*
>
> "Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations * * *.

STATEMENT

1. In July 1974 the Sierra Club, the National Parks and Conservation Association, and the Natural Resources Defense Council (respondents) initiated this action against the Secretary of the Interior and the Director of the Office of Management and Budget (OMB) (A. 6).[1] Respondents are environmental organizations with a combined membership of approximately 200,000. They alleged that many of their members use the National Wildlife Refuge System, a network of more than 350 wildlife refuge areas, encompassing more than 30 million acres, administered by the Fish and Wildlife Service of the Department of the Interior.[2] Respondents alleged that their members are adversely affected in their use of the Refuge System by the environmental impact of proposals made by Interior and by OMB concerning the operation and maintenance of the System (A. 9-12, 95).

Respondents claimed that when Interior submits its annual budget for the Refuge System to OMB, and when OMB in turn recommends an annual level of funding for the System for the President to include in the Budget he submits to Congress, these communications are "recommendation[s] or report[s] on

[1] "A." refers to the appendix to the briefs filed in the court of appeals on March 19, 1976. By order entered February 21, 1979, respondents' motion to dispense with the filing of an appendix in this Court was granted.

[2] The Refuge System is administered under the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd *et seq.*

proposals for legislation * * * significantly affecting the quality of the human environment * * *" under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C) (A. 17). Therefore, respondents alleged, these budget communications must be accompanied by an environmental impact statement (EIS) as provided in that Section. Respondents alleged that no such environmental impact statements were prepared, and they sought a declaratory judgment requiring Interior and OMB to prepare, consider, and disseminate an environmental impact statement in connection with each annual budget request for the Refuge System. They also sought a declaration that, under Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), OMB must establish formal methods and procedures to identify those submissions made by federal agencies during the budget process that must be accompanied by environmental impact statements (A. 18-20).[3]

In their answer to the complaint, OMB and Interior admitted that they had not prepared an environmental impact statement for any annual budget request they had made for the Refuge System. They maintained that Section 102(2)(C) of NEPA does

[3] An additional claim in the complaint was that Interior and OMB, without public notice, had made "major policy decisions" to cut back, curtail, and underfinance the operations of the Refuge System. Interior was accused of violating NEPA because it had failed to prepare an environmental impact statement to accompany its alleged adoption of this policy. Interior and OMB denied that such a policy had been adopted (A. 14, 20). The district court made no finding or ruling as to whether such a policy had been adopted.

not require agencies to prepare environmental impact statements in connection with annual budget requests or recommendations (A. 25).[4] They submitted affidavits, with attached exhibits, describing the numerous steps involved in the preparation of the President's annual Budget insofar as it relates to the Refuge System, the time constraints imposed by a process that must be repeated annually, the requirement of confidentiality, and the other conditions under which budget decisions are made within the Executive Branch (Pet. App. 63a, 73a; A. 95, 225, 264, 275).

Specifically, one of the affidavits, by Royston C. Hughes, Assistant Secretary of the Interior for Program Development and Budget, described the steps involved in preparing the budget request for the National Wildlife Refuge System for fiscal year 1975.[5]

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[4] Petitioners did not argue in the courts below that there is no private right of action to enforce the requirement of Section 102(2)(C) that an EIS be prepared in connection with a "recommendation or report on proposals for legislation * * *." The issue is not jurisdictional, and we have not attempted to raise it in this Court. We note, however, that it is a question on which the lower courts have divided. Compare *Atchison, Topeka and Santa Fe Ry.* v. *Callaway*, 431 F. Supp. 722, 726-729 (D.D.C. 1977), with *Wingfield* v. *OMB*, 9 E.R.C. 1961, 1962-1963 (D.D.C. 1977). The issue may arise in future litigation under Section 102(2)(C) and can appropriately be addressed at that time.

[5] Fiscal year 1975 began July 1, 1974, and ended June 30, 1975. See 31 U.S.C. (1970 ed.) 1020. Beginning with fiscal year 1977, Congress altered the fiscal year to begin on October 1 and end on September 30. 31 U.S.C. 1020. The President's Budget is still submitted to Congress in early January of each year.

The Budget for that fiscal year was sent to Congress in January 1974. During the previous February, OMB issued to the Secretary of the Interior its tentative suggestion regarding the maximum appropriations level for the Department. The Secretary allocated the departmental total into "target budget amounts" for each agency and activity in the Department, and each Assistant Secretary and agency head was directed to prepare "program strategy papers" describing how they intended to meet the Secretary's "target budget amounts" in a manner conforming to departmental priorities and policies (Pet. App. 74a-75a).

In mid-May 1973, the "program strategy papers" were submitted to the Secretary. In July, the Assistant Secretary for Program Development and Budget submitted "secretarial issue papers" highlighting the choices and conflicts to be resolved by the Secretary among the various programs and activities competing for funding requests. Throughout July the Secretary conducted budget conferences with units of the Department, and in August he issued revised tentative allocations for new "target budget amounts." Heads of subordinate agencies, including the Director of the Fish and Wildlife Service, had opportunities to seek budgetary revisions by the Secretary until late August (Pet. App. 75a-76a).

In late September 1973, Interior's draft budget justifications were sent to OMB. Officials from OMB and Interior then conferred on several occasions over Interior's proposed budget and its justifications. After a personal review by OMB's Director, OMB in-

formed Interior in late November of the appropriation request for the Interior Department that OMB would recommend, in line with previously formulated presidential priorities, for presidential approval. Until late December, the Secretary of the Interior had the opportunity to appeal directly to the President for revision of the Department's budget allowance. The President also retained personal authority to revise the departmental budget request at any time before, or even after, its submission to Congress (Pet. App. 65a-66a, 76a-78a).[6]

When the President sent the Budget for fiscal year 1975 to Congress in January 1974, this was the first public announcement of requested appropriations for the Refuge System and all other federal programs. Before release of the Budget, under longstanding procedures, the amounts and nature of proposed appropriations under discussion remain confidential within the Executive Branch (Pet. App. 71a; see OMB Circular A-10, ¶ 3 (Rev. Jan. 18, 1964) (A. 225)).

OMB and Interior maintained that, in light of the short time periods within which budget decisions are made[7] and the requirement of confidentiality during the budget preparation process, it would be not only

[6] We are advised by Interior and OMB that no major changes have been made since fiscal year 1975 in the successive phases of budget-making for the Refuge System.

[7] The affidavit of Royston C. Hughes illustrates the time constraints involved. He notes that decisions on the Interior Department's proposed budget are not tentatively made until early December, are not finally made until late December, and are transmitted to Congress in mid-January (Pet. App. 78a).

impractical, but inconsistent with the nature of executive decisionmaking, to require the preparation of environmental impact statements for budget requests. They contended that nothing in NEPA should be understood to require this result.

2. The district court granted respondents' motion for summary judgment (Pet. App. 61a-62a). The court held that agency budget requests are "proposals for legislation" within the meaning of Section 102 (2)(C) of NEPA, and that OMB and Interior must therefore prepare, consider, and disseminate an environmental impact statement on every annual request or recommendation they make for funding the environmentally-significant Refuge System (Pet. App. 49a-52a). The court found support for its conclusion in the congressional objective of ensuring executive consideration of environmental values during the "constant revision and reevaluation of ongoing projects" (Pet. App. 50a, quoting *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181 (6th Cir. 1972)).[8]

[8] The court further relied (Pet. App. 50a-52a) on guidelines adopted by the Council on Environmental Quality (CEQ) providing that agencies are to prepare environmental impact statements on "[r]ecommendations or favorable reports relating to legislation including requests for appropriations." 40 C.F.R. 1500.5 (1977). The court of appeals also gave weight to the CEQ guidelines (Pet. App. 6a n.8).

After the decision of the court of appeals, CEQ proposed to adopt regulations to amend this portion of its guidelines to provide that "'[l]egislation' * * * does not include requests for appropriations" (footnote omitted). 43 Fed. Reg. 25244, 25245 (1978). This regulation was adopted by CEQ on November 29, 1978, with an effective date of July 30, 1979. 43 Fed. Reg. 55978, 56004 (1978). The regulation is discussed at pages 39-44, *infra*.

The district court stated that since EIS preparation can begin before the request is made, "it is irrelevant that final budget decisions are presently made in a very short time frame" (Pet. App. 54a). The court said the effect of its decision would be limited because (*id.* at 55a) "[a]ppropriation proposals for most federal agencies would not appear to pose a threat to the environment and therefore no impact statement would be required." The court rejected the government's claim of confidentiality for appropriation requests and accordingly found no bar to requiring publicly disseminated environmental impact statements to accompany those requests (*id.* at 55a-57a). Finally, without discussion, the court ruled that Section 102(2)(B) of NEPA requires OMB "to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated" (Pet. App. 62a).[9]

3. On appeal, the District of Columbia Circuit first addressed the question of standing. The respondent organizations had submitted no affidavits or other evidence to support their allegations that their members used the Refuge System and were adversely affected by the environmental impact of budget re-

[9] In entering its declaratory order the district court also stated that it would award "injunctive relief" to respondents (Pet. App. 61a-62a). No injunction was in fact entered, however. Respondents have disclaimed any interest in obtaining injunctive relief, and the court of appeals treated the case as one involving declaratory relief only (*id.* at 2a, 3a).

quests for the System (Pet. App. 8a).[10] The court noted, however, that the government had not specifically contested respondents' allegations (*id.* at 9a). The court reasoned that since respondents could almost certainly show that at least some of their members use the Refuge System, they could satisfy the "minimal" standing requirements of *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972) (Pet. App. 8a). Hence, the government's "general denial" of standing did not require that a trial be held to resolve the issue (*id.* at 9a). The court added, however, that if a genuine issue of fact was raised concerning the use of the wildlife refuges by respondents' members, the government could contest the issue in appropriate proceedings on remand (*ibid.*).[11]

On the merits, the court of appeals agreed with the district court that Congress intended the EIS requirement of Section 102(2)(C) to apply to the budget preparation process (*id.* at 10a-14a). The

[10] Respondents also claimed standing on the basis of their asserted organizational interests in obtaining, evaluating, and disseminating the budgetary information concerning the Refuge System which they asserted that NEPA required the agencies to compile and disclose (Pet. App. 9a n.16). The court of appeals found it unnecessary to pursue this theory (*ibid.*).

[11] Judge MacKinnon stated in dissent that respondents should be required to demonstrate not only that their members use the wildlife refuges, but also that there is "a causal connection between the proposed appropriation [under consideration by Interior or OMB] and some identifiable decline in one of [their] members' use of a wildlife refuge" (Pet. App. 27a).

court of appeals concluded, however, that application of the EIS requirement to "every budget request for the annual operation * * * of an agency whose activities may have significant environmental impact" would "trivialize NEPA" (*id.* at 14a, 17a).[12] In order to provide "a limiting principle" (*id.* at 15a), the court concluded that the Act's reference to "proposals for legislation" should be understood to encompass proposals for "taking new action which significantly changes the status quo, not * * * a routine request for budget approval and appropriations for continuance and management of an ongoing program" (*id.* at 17a). In addition, even where there is no proposal to change the status quo, the EIS requirement would apply

> to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. * * * Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review.

[12] Despite the district court's suggestion that its ruling would have only a limited effect, the court of appeals noted that the phrase "significantly affecting the quality of the human environment" in Section 102(2)(C) has received a broad application and could apply, for example, to activities of the ICC and the SEC (Pet. App. 14a n.27, citing *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320-321, 322-327 (1975), and *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689 (D.D.C. 1974)).

Pet. App. 17a & n.32. The court summarized this holding by stating that "an EIS is required when such a new look is had. * * * It is impossible to have a 'new look' at everything all the time. When there is such a new look the ensuing request for appropriations is a 'proposal for legislation' under NEPA" (*id.* at 18a).

Applying this "new look" principle to this case, the court observed that, subsequent to the decision of the district court, the Department of the Interior, in the exercise of its discretion, had completed a "programmatic EIS" for the Refuge System (*id.* at 18a).[13] The adequacy of this EIS as a long-term analysis of the environmental consequences of the proposed and alternative levels of funding for the System over the next decade was not challenged by respondents (*id.* at 19a).[14] The court accordingly held that "there is no further obligation under NEPA at this time" with respect to budget requests for the Wildlife Refuge System (*id.* at 23a), and it reversed the portion of the district court's judgment that directed Interior and OMB to prepare an EIS on each annual budget request for the System (*id.* at 19a).

[13] The draft environmental statement was issued in November 1975 (40 Fed. Reg. 54451, 55376-55378) and the final EIS, entitled *Final Environmental Statement: Operation of the National Wildlife Refuge System*, in November 1976 (41 Fed. Reg. 53129).

[14] The Department of the Interior indicated that it intended to update the programmatic EIS in the future to take account of altered plans or circumstances (Pet. App. 18a).

The court of appeals affirmed, however, the portion of the district court's order that directed OMB to develop formal methods and procedures to identify those agency actions that require environmental statements (*id.* at 20a-23a). The court held that NEPA requires OMB, "as the key agency in the executive's budget formulation process, to give appropriate guidance to the agencies" (*id.* at 20a). It indicated that such guidance was particularly important in view of the court's holding that some but not all budget requests constitute "proposals for legislation" under the Act (*id.* at 19a-20a). OMB was thus directed "to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process when it culminates in proposals for legislation under the principles previously discussed" (*id.* at 21a).

Judge MacKinnon dissented from the principal holdings of the court. He noted that under this Court's decisions in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 404 (1976), and *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320 (1975), as well as the language of the Act, the EIS requirement of Section 102(2)(C) becomes applicable only when a final "proposal" for federal action is made (Pet. App. 28a-30a). Since "in the budget-making process there is no final proposal until the President includes the item in his budget to Congress" (*id.* at 29a), the prior requests, recommendations, discussions, and negotiations concerning agency budget items within the Executive Branch are not final so as to be subject to the

EIS requirement. This conclusion is reinforced, Judge MacKinnon argued, by the confidentiality of the federal budget until it is released by the President. Preparation and publication of environmental studies on budget requests would interfere, in particular, with "the confidential nature of the communications between the President and units within the Executive Office" (*id.* at 45a).

Moreover, even if budget requests were "proposals" under the Act, they still would not be "proposals for legislation," Judge MacKinnon argued. Congress has traditionally distinguished between "legislation" and "appropriations," and Judge MacKinnon concluded that there was no reason to think that it departed from its customary usage here (*id.* at 31a-41a). Thus, agreeing with the majority that "it would be absurd to construe [NEPA] and its implementing regulations to require an EIS with each annual budget request," Judge MacKinnon found it "even more absurd—and equally contrary to the language of the statute—" to construe it to require the agency "to produce the half-way measure of a 'programmatic' environmental statement" (*id.* at 48a).

Finally, Judge MacKinnon disagreed with the majority's conclusion that Section 102(2)(B) imposes a duty on OMB to issue guidelines to federal agencies concerning their obligations, as declared by the majority, to prepare and publish environmental impact statements in connection with budget requests. To the extent that regulations governing environmental studies are required of agencies under the Act, Judge

MacKinnon found nothing to suggest that regulations adopted by agencies for their own use, such as those of the Department of the Interior, are not sufficient (*id.* at 46a-47a).

SUMMARY OF ARGUMENT

I

In enacting Section 102(2)(C) of NEPA to require federal agencies to prepare environmental impact statements in connection with "proposals for legislation," Congress did not make this requirement applicable to requests for annual appropriations made by federal agencies to OMB or to recommendations on such appropriations made by OMB to the President.

A. Even if it is assumed that appropriations constitute "legislation" within the meaning of NEPA (a proposition we challenge below), annual budget requests by federal agencies to OMB and by OMB to the President do not constitute "proposals" for such legislation. There is no "proposal" until the President submits the Budget to Congress.

In holding to the contrary, the court of appeals failed to consider that, under Section 201(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 11(a), only the President is empowered to submit the Budget to Congress. When Congress enacted the Budget and Accounting Act, one of its principal objectives was to concentrate the political responsibility for preparing the national Budget in the President. Agencies were generally prohibited from submitting independent budget requests to Congress. 31 U.S.C. 15. Thus, funding requests within the Executive Branch are

tentative and provisional. They constitute part of the "germination process" of the President's budget proposal. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976). The agencies' budget requests to OMB as the President's delegate for budget preparation, and the recommendations of OMB to the President, do not constitute "proposals" within the meaning of NEPA, and the statute thus does not require that an EIS be prepared with respect to them.

B. Moreover, in enacting Section 102(2)(C) to require agencies to prepare an EIS in connection with "proposals for legislation," Congress did not intend the statute to apply to the budget process.

(1) Congress has traditionally distinguished between "legislation" and "appropriation" and does not use the former term to include the latter. Since the distinction between "legislation" and "appropriation" is deeply engrained in congressional usage, it is reasonable to infer that when Congress in Section 102(2)(C) used the term "legislation" with reference to its own activity, it intended to convey the meaning that it customarily gives that term. There is nothing in the history of NEPA to suggest a different intent.

(2) Regulations recently adopted by the Council on Environmental Quality confirm this understanding of the Act. They provide that the EIS requirement for "proposals for legislation" applies to "a bill or legislative proposal" but not to "requests for appropriations." 43 Fed. Reg. 55978, 56004 (1978).

(3) Application of the traditional distinction between "legislation" and "appropriation" yields a rea-

sonable statutory scheme. An environmental impact statement is required with respect to proposals for "legislation," such as the authorization of a new program, and an EIS is also required whenever specific proposed actions implementing such legislation will constitute "major Federal actions significantly affecting the quality of the human enviroment * * *." 42 U.S.C. 4332(2)(C). Construing Section 102(2)(C) to apply to "legislation," but not to "appropriations," avoids only the requirement of a third EIS review at the intermediate stage when annual budget requests to finance previously enacted legislation are formulated.

It is at least questionable whether there is sufficient time in the annual budget cycle for agencies to prepare adequate impact statements on all their appropriations requests that might affect the environment. More important, a requirement that an EIS be prepared by the agency at the time it submits its budget request would threaten the essential political discretion exercised by the President in the budget process by impairing the flexibility and confidentiality that the process requires.

(4) The court of appeals attempted to avoid some of these consequences by devising "a limiting principle" that would allow some application of NEPA in the budget process "[without] overburdening NEPA by spreading its mandate too widely" (Pet. App. 15a, 16a). The court thus held that an agency's budget request constitutes a "proposal for legislation" under NEPA only if it involves a "significant change" or

a "new look" at the agency's programs (Pet. App. 16a, 17a). The court's holding is vague and uncertain and lacks any foundation in the language or history of the statute. The "limiting principle" adopted by Congress in Section 102(2)(C) was to create an EIS requirement for "legislation" but not for "appropriation."

II

A. Even if we assume that Section 102(2)(C) requires agencies to prepare impact statements in connection with "some but not all" budget requests, as the court of appeals held (Pet. App. 19a-20a), the court erred in concluding that Section 102(2)(B) imposes an obligation on OMB to promulgate EIS guidelines for other agencies. Nothing in Section 102(2)(B) suggests that OMB is directed, or even authorized, to adopt procedures to guide other agencies concerning the independent responsibilities those agencies may have under Section 102(2)(C) to prepare environmental impact statements. The court of appeals erred in relying on the generalized language of Section 102(2)(B) to allocate to OMB a responsibility that Congress in Section 102(2)(C) expressly assigned to the individual agencies.

B. Moreover, respondents lack standing to claim that Section 102(2)(B) imposes a duty on OMB to issue guidelines to elaborate the asserted responsibility of federal agencies to prepare environmental impact statements during the budget process. Guidelines adopted by OMB would neither add to, nor detract from, the duty of each agency to prepare an EIS

when Section 102(2)(C) so requires. Any claim that respondents are injured by the absence of guidelines requiring agencies to do what (by hypothesis) they are already required to do by statute is based on "unadorned speculations" that do not suffice to invoke the federal judicial power.

ARGUMENT

I. SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT DOES NOT REQUIRE FEDERAL AGENCIES TO PREPARE ENVIRONMENTAL IMPACT STATEMENTS IN CONNECTION WITH ANNUAL BUDGET REQUESTS FOR PREVIOUSLY ESTABLISHED FEDERAL PROGRAMS

The court of appeals has held that annual budget submissions made by federal agencies to the Office of Management and Budget and by OMB to the President for previously established programs affecting the environment constitute "proposals for legislation" that must be accompanied by environmental impact statements under NEPA, though the court limited its holding to submissions that would "significantly change[] the status quo" or that reflect an agency's "new look" at a program.[15] This holding

[15] Although the court of appeals reversed the declaratory judgment of the district court requiring the Secretary of the Interior to prepare impact statements in connection with budget requests for the Refuge System, because of the EIS that the Secretary had voluntarily prepared (see page 15, *supra*), the Secretary, as well as the Director of OMB, retains a litigable interest in this case. The decision of the court of appeals, unless reversed, will require the Secretary to prepare additional impact statements in connection with budget requests "significantly chang[ing] the status quo" or reflecting a "new look" for both the Refuge System and other departmental programs. Moreover, the portion of the judgment that requires OMB to issue guidelines directing other agencies (including Interior) to prepare impact statements in connection with these classes of budget requests (see page 16, *supra*) constitutes an indirect imposition of this requirement on the Secretary.

marks the first significant judicial intervention in the processes of the Executive Branch that culminate in the President's annual submission of his Budget to Congress.[16] As we shall demonstrate, nothing in NEPA requires this result.

In order to place the discussion of NEPA in its proper context, we first describe the statutory and constitutional framework within which the President's Budget is prepared and submitted to Congress.

[16] Two other decisions have applied NEPA to the budget process. These cases have involved funding requests for discrete federal projects rather than an agency's general budget proposal for an entire program or activity. See *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181-1182 (6th Cir. 1972); *Aluli* v. *Brown*, 437 F. Supp. 602 (D. Haw. 1977), appeal pending. Thus, even if it is assumed that those decisions are correct, the decision in this case is much broader. It potentially affects budget-making for the entire Department of the Interior and for all federal agencies and programs that might affect the quality of the human environment, since OMB has been directed by the court of appeals to issue guidelines to identify all federal budget proposals for which an EIS is to be prepared under the court's decision. In contrast, other courts have refused to impose procedural conditions or reporting or disclosure requirements on the budget-making process. *Sierra Club* v. *Department of the Interior*, 424 F. Supp. 172, 175 (N.D. Cal. 1976); *National Wildlife Federation* v. *United States*, Civil No. 78-1039 (D.D.C. July 20, 1978), appeal pending, No. 78-1976 (D.C. Cir.).

The President's authority to submit an annual Budget to Congress is part of his constitutional responsibility to "from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient" (U.S. Const. art. II, § 3). Throughout the nineteenth century the President did not ordinarily participate personally in the budget process, but left to each agency the responsibility for preparing and submitting appropriations requests. See H.R. Rep. No. 362, 66th Cong., 1st Sess. 3-4 (1919). As the number of federal agencies grew and the amount of federal spending increased, Congress became dissatisfied with the parochial approach often taken by individual agencies in submitting their budget requests and with the absence of direct presidential involvement in the budget process. Congress therefore enacted the Budget and Accounting Act, 1921, for the "primary purpose" of insuring that the President, rather than individual agencies, would be directly responsible for "the preparation and submission of the Budget" (*id.* at 6).[17] The House Report emphasized (*id.* at 5-6):

> [The President] is the only officer of the administrative branch who is interested in the Government as a whole rather than in one particular part. He is the only administrative officer who is elected by the people and thus can

[17] The President had, of course, directly participated in the submission of a proposed budget on many occasions prior to 1921. See generally L. Fisher, *Presidential Spending Power* 9-35 (1975).

> be held politically responsible for his actions. Furthermore, as head of the administration it is to him that Congress and the people should look for a clear and definite statement of what provision in his opinion should be made for the revenue and expenditure needs of the Government.

Thus, the objective of the Budget and Accounting Act is to insure that Congress has "before it the recommendations of the President in the form of a national budget" rather than "unrelated, and unrevised [estimates from individual agencies] representing the personal views and aspirations of bureau chiefs." S. Rep. No. 524, 66th Cong., 2d Sess. 6 (1920). See also 59 Cong. Rec. 7945, 7947-7948 (1920); S. Rep. No. 93-579, 93d Cong., 1st Sess. 6 (1973).

To accomplish this objective, Section 201 of the Act, 31 U.S.C. 11(a), directs the President to transmit the Budget to Congress at the beginning of each regular session. The Budget is to be prepared under the President's direction, and "under such rules and regulations as the President may prescribe." 31 U.S.C. 16. The President is assisted in this task by the Office of Management and Budget, which is part of the Executive Office of the President. Section 207, 31 U.S.C. 16.[18] Executive agencies are directed to

[18] The original version of the Act created the Bureau of the Budget, located then in the Treasury Department, to assist the President in preparing the Budget. Ch. 18, Section 207, 42 Stat. 22. In Reorganization Plan No. 1 of 1939, 53 Stat. 1423, the Bureau of the Budget was transferred from

submit departmental budget estimates to OMB rather than to Congress. Section 215, 31 U.S.C. 23. The intent of Congress to establish personal authority over the Budget in the President, and to bar individual agencies from dealing directly with Congress in the budget-making process, was made express in Section 206 of the Act, 31 U.S.C. 15, which provides that

> [n]o estimate or request for an appropriation * * * shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress.

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the Treasury Department to the Executive Office of the President. In Reorganization Plan No. 2 of 1970, 84 Stat. 2085, the Bureau of the Budget was abolished and its budget-making functions were transferred directly to the President, who then delegated this responsibility to the newly established OMB. Executive Order No. 11541, 35 Fed. Reg. 10737 (1970). See also L. Fisher, *supra* note 17, at 46-51. This arrangement, with OMB performing budget preparation responsibilities as the President's delegate, has been retained. Congress enacted legislation in 1973 to vest the budget-preparation function directly in OMB by statute; however, the bill was vetoed by the President. See Office of Management and Budget, Veto Message, S. Doc. No. 93-16, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-697, 93d Cong., 1st Sess. 3 (1973). Congress amended Section 207 of the Budget and Accounting Act in 1974 to provide for Senate confirmation of the Director and Deputy Director of OMB. Pub. L. No. 93-250, 88 Stat. 11. In doing so, Congress disclaimed any intent to alter or redefine OMB's role as the President's delegate in performing budget-preparation responsibilities. H.R. Rep. No. 93-697, *supra*, at 1, 3. See also L. Fisher, *supra*, at 53-54.

Through his personal participation in preparing the Budget and transmitting it to Congress, the President provides the legislature with a comprehensive statement of the political objectives of his Administration. The President's Budget is "a bridge * * * between the legislative and the executive branches" for the communication of national political and social goals. Lawton, *Legislative-Executive Relationships in Budgeting as Viewed by the Executive*, 13 Pub. Admin. Rev. 169, 170 (1953). See also S. Rep. No. 93-579, *supra*, at 13-14; A. Wildavsky, *The Politics of the Budgetary Process* 4-5 (1964). Because the issues of policy that affect the President's budget decisions are inherently political in nature, freedom of communication within the Executive Branch is essential. Budget discussions within the Executive Branch are therefore conducted under a requirement of confidentiality. Budgetary material is not to be disclosed "in any form" prior to the President's transmittal of the Budget. OMB Circular A-10, ¶ 3 (Rev. Jan. 18, 1964) (A. 225).

The discussions and negotiations within the Executive Branch on preparation of the annual Budget take place under the severe time constraints that an annual process imposes. See note 7, *supra*. The final decision on appropriations to be requested in the Budget rests with the President. The heads of executive agencies often confer personally with the President on their agency's budget requests, and the President's final decision is often made less than a month before the Budget is transmitted to Congress. See pages 9-10, *supra*.

The decision of the court of appeals in this case construes NEPA to impose a requirement that is fundamentally incompatible with the time constaints, the need for political flexibility, and the tradition of confidentiality that characterize the budget-making process. By construing the statute in a manner that impinges on the President's effectiveness and freedom of action in preparing his recommendations on annual appropriations for submission to Congress, the decision assumes for the Judiciary an authority to regulate the internal decisionmaking of the Executive Branch and the communications between the Executive and Legislative Branches.

These results are unwarranted. As we shall show, in requiring federal agencies to prepare an EIS in connection with "proposals for legislation," Congress did not intend to apply this requirement to requests for annual budget allocations within the Executive Branch, and more generally did not intend to apply it to any requests for appropriations.

A. Annual Budget Requests by Federal Agencies to OMB and by OMB to the President Are Not "Proposals for Legislation" Under Section 102(2)(C) of NEPA Because Until the President Sends His Budget to Congress There Is No "Proposal" Within the Meaning of That Section

In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976), the Court held that Section 102(2)(C) of NEPA gives a court "no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination

process of a potential proposal" at which an impact statement must be prepared. Instead, "the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action.' *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 320 (1975) (*SCRAP II*) (emphasis in original)." 427 U.S. at 406.

In holding that "significant change" and "new look" budget requests by federal agencies to OMB and by OMB to the President constitute "proposals for legislation" under Section 102(2)(C) of NEPA, the court of appeals failed to consider that, under Section 201(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 11(a), only the President is empowered to submit the Budget to Congress. Even if the Court were to conclude, contrary to our contention (Point I(B), *infra*), that congressional appropriations constitute "legislation" under NEPA, it is not until the President has submitted the Budget to Congress that such "legislation" has been "proposed."

When Congress enacted the Budget and Accounting Act, one of its principal objectives was to insure that only the President, and not individual agencies, would transmit budget proposals to Congress. See pages 24-25, *supra*. The agencies were generally prohibited from submitting independent budget requests to Congress, 31 U.S.C. 15, and their function in the budget process was limited to assisting the President in a confidential capacity in the development

of the President's Budget.[19] 31 U.S.C. 11, 16; OMB Circular A-10, ¶ 3 (A. 225). See pages 24-26, *supra*. Congress thus sought to concentrate the political responsibility for preparing a national budget for the President. 31 U.S.C. 11, 16.

As a result, agency funding requests to OMB, as well as the communications between OMB and the President, are tentative and provisional. The President retains personal authority to determine the appropriations to be requested in the Budget, and exercises discretion to defer or reformulate recommended decisions on particular budget requests. See *ibid.*; Scheele, *President Carter and the Water Projects: A Case Study in Presidential and Congressional Decision-making*, 8 Presidential Studies Quarterly 348 (1978). The agencies' provisional determinations thus may be revised "as a result of later Presidential decisions." *The Budget of the United States Government, Fiscal Year 1980*, Part 7, 339 (1979). As Judge MacKinnon observed in his dissent:

> the statutory and constitutional scheme governing the budget-making process make it clear that the task of submitting a proposed budget is solely a *presidential* responsibility. It is not until the President himself has acted that any budget request has been *proposed.*

Pet. App. 29a-30a; emphasis in original.[20] Agency funding requests constitute only predecisional recommendations that are part of the "germination process" of the President's budget proposal. See *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.[21] Thus, the agencies' budget requests do not constitute "proposals" within the meaning of NEPA, and the statute does not require that environmental impact statements be prepared.[22]

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[19] Congress has altered this practice only with respect to three specific agencies. See note 43, *infra*.

[20] The statutory and constitutional emphasis on presidential decisionmaking in the budget process is comparable to the provision for presidential review of certificates granted for overseas and foreign air transportation. As this Court observed in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 114 (1948):

> We conclude that orders of the [Civil Aeronautics] Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.

[21] The court of appeals attempted to distinguish this case from *Kleppe* by stating that *Kleppe* "was based on the finding that there was no program to analyze," whereas here the Refuge System is a federal program (Pet. App. 16a n.29). But the court, in quoting from one portion of the opinion in *Kleppe* (427 U.S. at 400-401), disregarded the subsequent portion of the opinion (*id.* at 404-406) in which this Court assumed "that a regional program was contemplated" (*id.* at 404) and held that the court of appeals had nonetheless erred in requiring that an EIS be prepared "at some point prior to the formal recommendation or report on a proposal" (*id.* at 404).

[22] Although the question is not presented here, nothing in NEPA would require the President to submit an EIS to Congress at the time the Budget is transmitted. The Budget is "proposed" at that time, but, as we argue below (pages 34-55, *infra*), the proposal is not for "legislation." In addition, Section 102(2) of NEPA, 42 U.S.C. 4332(2), applies only to "agencies of the Federal Government," and the Presi-

Any construction of NEPA that imposed procedural restrictions on the information the President may receive from executive agencies in the performance of his discretionary and political responsibilities for the Budget would pose constitutional difficulties. Article II, Section 2, Clause 1 of the Constitution provides that "The President * * * may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices * * *." When the President requests advice and recommendations of the executive departments with respect to the annual budget, it "would raise serious constitutional questions" under the Opinion Clause

> [f]or a court to require that an impact statement must be filed after the specified comment period before the President could receive the recommendations * * *. Applying the impact statement process to such recommendations necessarily burden and inhibit "the policy of open, frank discussion between subordinate and chief concerning administrative action." *Environmntal Protection Agency* v. *Mink*, 410 U.S. 73, 87 (1973), quoting *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (1958) (Reed, J.) [citations omitted].

Alaska v. *Carter*, 12 E.R.C. 1486, 1490-1491 (D. Alas. 1978).[23] A construction of NEPA creating this constitutional objection should be avoided, especially in the absence of any suggestion in the language or history of the Act that Congress intended such a result. *E.g.*, *United States* v. *Rumely*, 345 U.S. 41, 45 (1953); *Crowell* v. *Benson*, 285 U.S. 22, 62

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dent is not an "agency." Most important, any construction of NEPA that sought to impose judicially enforceable limitations on the President's authority and ability to communicate budget requests to Congress would risk "breaching the separation of powers doctrine, and potentially infringing upon the President's constitutional power to present recommendations for legislation to the Congress." *Chamber of Commerce* v. *Department of Interior*, 439 F. Supp. 762, 767 (D.D.C. 1977); see *Wingfield* v. *OMB*, 9 E.R.C. 1961, 1963 (D.D.C. 1977).

This case also does not present the question whether an agency may be required by NEPA to prepare an EIS if, after the President's Budget has been proposed, the agency prepares a report or recommendation on the President's proposal. We note, however, that such a requirement does not exist if, as we argue below, requests for appropriations do not constitute proposals for "legislation" under NEPA.

[23] *Alaska* v. *Carter*, *supra*, involved the President's exercise of authority to withdraw public land in Alaska for public monuments under the Antiquities Act of 1906, 16 U.S.C. 431. The State contended (12 E.R.C. at 1490) "that the Secretary of Interior could not advise [the President] as to the proposed boundaries [of land to be withdrawn] or assist him in any way without triggering the impact statement process of NEPA." The court noted the constitutional difficulties of this proposed interpretation and stated (*id.* at 1491) that it would "avoid that interpretation absent a 'clear statement' of a contrary legislative intent," citing *United States* v. *Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971), and *United States* v. *Rumely*, 345 U.S. 41, 45 (1953). Since neither the statute nor its history reveals such an intent, the court held (12 E.R.C. at 1491):

> that any recommendations by the Secretary of Interior on the exercise of the President's powers under the Antiquities Act, which recommendations have been requested by the President, do not come under the NEPA impact statement process.

(1932); *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 346 (1928).

B. Requests for Annual Appropriations to Support Previously Established Federal Programs Are Not "Proposals for Legislation" Under Section 102(2)(C) of NEPA Because Appropriations Are Not "Legislation" Within the Meaning of That Section

1. Congress Has Traditionally Distinguished Between "Legislation" and "Appropriation," and All Indications Are That It Did So in NEPA

In enacting Section 102(2)(C) of NEPA to require agencies to prepare an EIS in connection with "proposals for legislation," Congress did not intend to impose an EIS requirement on the budget process. As Judge MacKinnon explained in his dissent (Pet. App. 30a-41a), Congress has traditionally distinguished between "legislation" and "appropriation" and does not use the former term to include the latter.

Legislation is the making of substantive rules, including authorization of new programs; appropriation is the funding of authorized programs. Thus, under the Rules of the House, "Language in [a general] appropriation bill changing existing law is legislation and not in order." Rule XXI, Clause 2, as stated in *Deschler's Procedure* 295 (1974); see also 4 *Hinds' Precedents*, Sections 3811-3812 (1907); Standing Rules of the Senate, Rule 16.4; *TVA* v. *Hill*, 437 U.S. 153, 190-191 (1978); *United States* v. *Dickerson*, 310 U.S. 554, 559 (1940).[24]

[24] Congress has emphasized the dichotomy between authorization and appropriation in its "tendency in recent decades to move toward annual authorization, requiring action each year by the legislative committees prior to passage of appropriation bills." L. Fisher, *"Budget Concepts and Terminology: The Appropriations Phase,"* in I Fund for Public Policy Research, *Studies in Taxation, Public Finance and Related Subjects—A Compendium* 436, 438 (1977). This bifurcated procedure stresses the distinct roles played by "legislation" and "appropriation"—which are, of course, the provinces of separate committees in each house.

Congress has frequently been confronted with the contrast between legislation and appropriations in its procedural rulings, and has maintained a sharp distinction in the usage of those terms. See, *e.g.*, 7 *Cannon's Precedents*, Sections 1172, 1410, 1443, 1445, 1448, 1454, 1459, 1463, 1470, 1472 (1936). Congress has also made the distinction in numerous statutes that refer separately to "legislation" and "appropriation." *E.g.*, 18 U.S.C. 1913 (proscribing the use of appropriated funds to influence any Congressman to favor or oppose "any legislation or appropriation"); 22 U.S.C. 2394(c); 42 U.S.C. 2996f(c)(2)(B). As this Court stated recently in *TVA* v. *Hill*, *supra*, 437 U.S. at 190: "We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs."

The distinction Congress maintains between "legislation" and "appropriation" is reflected in recent amendments to the Budget and Accounting Act. Section 201(a) of the Act was amended in 1970 to provide that when "new or additional legislation which would create or expand any function, activity, or au-

thority, in addition to those functions, activities, and authorities then existing," is proposed, the Budget is to show "the amount proposed * * * for appropriation and for expenditure in the ensuing fiscal year on account of such proposal * * *." 31 U.S.C. 11(a)(12)(A)(B).[25] The statute thus distinguishes precisely between proposals for "legislation" and for "appropriation" to carry out the legislated authority. The House Report on this amendment underscores the distinction, pointing out that the President's annual State of the Union Message traditionally presents the President's "legislative proposals and programs" while "his subsequent budget message projects the necessary spending for these programs * * *." H.R. Rep. No. 91-1215, 91st Cong., 2d Sess. 12 (1970).[26]

[25] The statute similarly requires inclusion in the Budget of the "estimated appropriation required on account of such proposal in each of the four fiscal years, immediately following that ensuing fiscal year, during which such proposal is to be in effect * * *." *Ibid.*

[26] It is true that, as the amendment recognizes, new legislative programs to be proposed are indicated in the Budget itself, to provide a framework for presenting total estimates of projected government expenditures. However, the actual submission of such new programs for consideration on their legislative merits is invariably done separately from the Budget. At the time of this submission by the interested agency (after clearance by the President through OMB, see OMB Circular A-19 (Rev. July 31, 1972)), NEPA's requirement of an EIS may be applicable (a question not presented here). (Thus there is no danger, as respondents suggest (Br. in Opp. 11), that agency proposals for environmentally significant legislation would be generally exempt from NEPA on the ground that the final proposal was submitted to Congress by the President.)

Since the distinction between "legislation" and "appropriation" is so deeply engrained in congressional usage, it is reasonable to infer that when Congress in Section 102(2)(C) of NEPA used the term "legislation" with reference to its own activity, it intended to convey the meaning that it customarily gives that term.

There is nothing in the history of NEPA to suggest a different intent. There is no indication that Congress used the term "legislation" loosely as including requests for appropriation. In fact, silence concerning the budget-making process characterizes virtually the entire legislative history of NEPA. The process is not mentioned in either the House or Senate Reports or in the Report of the Conference Committee. H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (1969).[27]

[27] When the conference report on NEPA was under consideration on the Senate floor, Senator Muskie, relying on written assurances from Senator Jackson, one of the conferees, stressed that recommendations by the President or by the Council on Environmental Quality "would be a vehicle for oversight hearings and hearings by the appropriate *legislative* committees of the Congress," 115 Cong. Rec. 40424 (1969) (emphasis added). The purpose of Senator Muskie's remarks was primarily to assure the Senate that NEPA's passage would not alter the jurisdiction of the various Senate committees. Senators Muskie and Boggs discussed the roles played by several legislative committees in environmental affairs (*id.* at 40424-40427). Neither the House nor Senate Appropriations Committees was mentioned as affected by, or concerned with, this legislation.

The impact statement requirement of Section 102 (2)(C) originated in the Senate (see H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969)), where it was characterized as a procedure requiring agencies to make "certain findings related to the environment" in their "legislative reports and recommendations for major Federal actions * * *." S. Rep. No. 91-296, *supra*, at 7. There is no suggestion here or elsewhere in the legislative history that budget-making procedures or agency budget requests to fund previously authorized programs were to be affected by this requirement.

Customarily, when Congress has desired the President to include additional information in the annual Budget, it has acted by amending Section 201 of the Budget and Accounting Act, 1921, 31 U.S.C. 11, which designates the contents of the Budget.[28] In 1974, in the most extensive revision of budgetary procedures since 1920, Congress substantially amended Section 201 by enacting the Congressional Budget Act of 1974, Pub. L. No. 93-344, Sections 601-604, 88 Stat. 323-324. The purpose of these amendments was to "provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties." Section 2(5)

[28] Prior to 1974, the major amendments to 31 U.S.C. 11 were made by the Budget and Accounting Procedures Act of 1950, ch. 946, Section 102(a), 64 Stat. 832, and by the Act of August 25, 1958, Pub. L. No. 85-759, Section 1, 72 Stat. 852. For a brief discussion of these and other amendments and their consequences, see General Accounting Office, Financial Management in the Federal Government, S. Doc. No. 92-50, 92d Cong., 1st Sess. 18-19, 45-54, 202-210, 214, 220-232 (1971).

of the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. 1301(5). Notwithstanding that the President and federal agencies had not submitted environmental impact statements with the Budget during the intervening five years since NEPA had been enacted, the 1974 amendments were silent with respect to environmental impact statements and environmental data generally. The fact that Congress, obviously aware of the executive practice in this regard, said nothing in 1974 to require or even suggest that environmental data be submitted with the Budget supports the conclusion that Congress never intended such a requirement. See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 14.

2. *Regulations Adopted By the Council on Environmental Quality Provide That Requests For Appropriations Do Not Constitute "Proposals For Legislation" Under NEPA*

In concluding that agency budget submissions are "proposals for legislation" subject to the EIS requirement of NEPA, the courts below noted that guidelines issued by the Council on Environmental Quality (CEQ) provided that an EIS should be prepared by agencies in connection with "[r]ecommendations or favorable reports relating to legislation *including requests for appropriations.*" 40 C.F.R. 1500.5(a)(1) (1977) (emphasis added). The court of appeals and the district court emphasized that the CEQ guidelines were entitled to significant weight as an aid to construction of the statute (Pet. App. 6a

n.8, 50a-52a). The court of appeals did not, however, regard the guidelines as controlling. Indeed, the court concluded that an EIS is not required for "requests for appropriations" unless a "significant change" or a "new look" at the agency's program is involved.

Whatever reliance the courts below may have placed on the guidelines, that reliance is no longer warranted. To the contrary, CEQ has now adopted regulations confirming that "proposals for legislation" do not include requests for appropriations.

a. CEQ was established by Congress in Section 202 of NEPA, 42 U.S.C. 4342, and was directed by the President in Executive Order No. 11514, § 3(h), 3 C.F.R. 902 (1966-1970 Compilation), to adopt guidelines to assist federal agencies in the preparation of environmental impact statements. While the guidelines have on occasion been held to merit considerable weight as an interpretation of NEPA, *e.g.*, *Scientists' Institute for Public Information* v. *AEC*, 481 F.2d 1079, 1088 (D.C. Cir. 1973); *Greene County Planning Board* v. *FPC*, 455 F.2d 412, 421 (2d Cir. 1972); but see *Sierra Club* v. *Lynn*, 502 F.2d 43, 58 (5th Cir. 1973), cert. denied, 421 U.S. 994 (1975), the guidelines have not been binding on federal agencies. *Ibid.*; *Hiram Clarke Civic Club, Inc.* v. *Lynn*, 476 F.2d 421, 425 (5th Cir. 1973); *Ely* v. *Velde*, 451 F.2d 1130, 1135-1136 n.14 (4th Cir. 1971).

In 1977, President Carter decided to replace the guidelines with a single set of uniform regulations setting forth the responsibilities of federal agencies in complying with the statute's requirements. The

President accordingly directed CEQ, in Executive Order No. 11991, § 1, 42 Fed. Reg. 26967 (1977), to

> [i]ssue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)).

The Executive Order provided that the regulations "shall be developed after consultation with affected agencies and after such public hearings as may be appropriate" (*ibid.*), and that upon their adoption the regulations would be binding on all federal agencies (*id.* § 2).[29]

After more than a year of study, including public hearings and analysis of public comments, the Council has issued final regulations that comprehensively revise the procedures federal agencies are to follow in performing their NEPA responsibilities. 43 Fed. Reg. 55978-56007 (1978).[30] In the revision most relevant to this case, Section 1508.17 of the regulations provides that the EIS requirement for "proposals for legislation" includes

> a bill or legislative proposal to Congress developed by or with the significant cooperation and

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[29] Section 2 of the Executive Order directs federal agencies to "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements."

[30] Section 1506.12 of the regulations (43 Fed. Reg. at 56002) provides that the "effective date of these regulations is July 30, 1979," but that "nothing shall prevent an agency from proceeding under these regulations at an earlier time."

support of a Federal agency, *but does not include requests for appropriations.*

43 Fed. Reg. at 56004 (emphasis added).[31]

In adopting this revision, the Council stated that "traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors" indicated the inappropriateness of imposing an EIS requirement on requests for appropriations (43 Fed. Reg. at 55989). After several years of application of NEPA,[32] "the Council in its experience found that preparation of EISs is ill-suited to the budget preparation process" (*ibid.*).[33]

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[31] The Council proposed the adoption of these regulations, including this particular revision, in June 1978 (43 Fed. Reg. 25244, 25245), subsequent to the decision of the court of appeals. At that time the Council noted (*id.* at 25245 n.1) that CEQ "in consultation with OMB had been prepared to propose this wording" before the decision of the court of appeals in this case, and invited "comment on the implications of [the] case" for the proposal. In adopting the final regulations in November 1978, CEQ noted that, after considering the comments it had received, it had "decided not to alter the scope of this provision." 43 Fed. Reg. at 55989.

[32] The Council noted that environmental reviews for appropriations requests "had not been conducted in the eight years since NEPA was enacted" (*ibid.*).

[33] However, the Council noted in the preamble to the regulations that "[n]othing in the Council's determination, however, relieves agencies of responsibility to prepare statements when otherwise required on the underlying program or other actions." 43 Fed. Reg. at 55989.

b. We asume that regulations issued by the Council under Executive Order No. 11991 will ordinarily be accorded substantial weight by the courts as administrative interpretations of the requirements of NEPA. CEQ was created by Congress to assist the President and the federal agencies in performing their responsibilities under NEPA. 42 U.S.C. 4342, 4332(2)(B); see *Warm Springs Dam Task Force* v. *Gribble*, 417 U.S. 1301, 1310 (1974) (Douglas, Circuit Justice). Moreover, the 1978 regulations, unlike the Council's previous guidelines, were expressly made binding on all federal agencies. Executive Order No. 11991, *supra*, at § 2. In view of the role assigned to CEQ by both Congress and the President in monitoring and implementing the requirements of NEPA, the informed judgment of the Council, as embodied in its regulations, should be accorded substantial weight in interpreting the Act. *Train* v. *NRDC*, 421 U.S. 60, 75 (1975); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

We recognize, however, that where, as here, the agency's current interpretation "contradicts the position which the agency had enunciated at an earlier date," *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976), this Court may subject the agency's current interpretation to greater than usual scrutiny. The Court has never held, however, that the first path chosen by an agency is the only path it may follow. The process of administration is a learning process, and "the thoroughness evident in [the

agency's] consideration, [and] the validity of its reasoning" (*ibid.*, quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)), can be enhanced as it develops experience through its implementation of the statute. Thus, the Court has held that an agency

> faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice.

American Trucking Ass'ns v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). Accord, *e.g.*, *Automobile Club of Michigan* v. *Commissioner*, 253 U.S. 180, 183 (1957); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 842 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); *Chisholm* v. *FCC*, 538 F.2d 349, 364 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976). As the Council observed when it adopted its new regulations in 1978 (43 Fed. Reg. at 55989), it is precisely the broad experience the Council has acquired in implementing NEPA that led it to conclude that the EIS requirement is inapplicable to the budget process.

It is not essential for the Court to define the precise degree of deference applicable to the Council's judgment in this regard. It is sufficient to note that the Council's regulation represents a construction of NEPA that is consistent with the language and history of the Act and with the statutory and constitutional context in which the Budget is prepared.

3. *Application of the EIS Requirement to Requests for Appropriations Would be Inconsistent With the Effective Preparation of the President's Budget and Would Threaten the Separation of Powers*

Application of the traditional distinction between "legislation" and "appropriation" in the context of Section 102(2)(C) yields a reasonable statutory scheme that avoids "absurd or futile results," *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). An environmental impact statement is required with respect to every proposal for "legislation," such as the authorization of a new program, and an EIS is also required whenever specific proposed actions implementing such legislation will constitute "major Federal actions significantly affecting the quality of the human environment * * *."[34] 42

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[34] Respondents claim (Br. in Opp. 6-7 n.5) that agency budget requests may, in some contexts, be subject to the EIS requirement applicable to "proposals for * * * major Federal actions significantly affecting the quality of the human environment." As we have explained (pages 28-34, *supra*), this contention is unacceptable because the agency's submission of a budget request to OMB and OMB's submission to the President do not constitute "proposals" within the meaning of the statute. Moreover, while the majority did not directly rule on respondents' claim, Judge MacKinnon correctly observed in dissent (Pet. App. 42a) that annual budget requests made pursuant to "existing legislative authorization" are not proposals for "major Federal actions." If a planned expenditure is associated with some major implementing action —such as the construction of a dam—an EIS will be prepared for that project; it is the proposed project or action, not the appropriation, that may in some contexts constitute major federal action.

Respondents appear also to be suggesting (Br. in Opp. 6-7 n.5) that the budget request is itself a "major Federal

U.S.C. 4332(2)(C). Construing Section 102(2)(C) to apply to "legislation," but not to "appropriations," avoids only the requirement of a third EIS review at the intermediate stage when annual budget requests to finance previously enacted legislation are formulated.

The court of appeals correctly perceived that interpretation of Section 102(2)(C) to require preparation of an EIS in connection with agency budget submissions to OMB, as "proposals for legislation," would "trivialize NEPA" and reach "ridiculous extremes" (Pet. App. 17a, 22a-23a). Such an application of the EIS requirement would, moreover, be incompatible with the process by which the Budget is prepared.

a. It is at least questionable whether there is sufficient time in the budget cycle for each agency to prepare an adequate EIS on its appropriations re-

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action" even if it is not a "proposal"—that is, that the language of Section 102(2)(C) should be read disjunctively as applicable to "proposals for legislation" on the one hand and to "other major Federal actions" on the other, rather than to "proposals for * * * other major Federal actions." See the opinion of the district court at Pet. App. 51a. This attempt to read the crucial term "proposals" out of the Act founders on the purpose, structure, and language of Section 102(2)(C), which goes on to state throughout its subparts that the EIS must relate to "the proposed action" or "the proposal." The "action" is never mentioned except in its "proposed" form, for the obvious reason that the Act was intended to bring environmental considerations into play *before* the action was taken.

quests.[35] The initial tentative guidance from OMB is received by each agency in February of each year; the tentative allocation of that total within the agency occurs in March; and the departmental submission to OMB is made in September (Pet. App. 74a-77a). If, for example, the Interior Department were required to submit an EIS at that time, it would have had approximately six months to prepare "a detailed statement" setting forth "the environmental impact" (42 U.S.C. 4332(2)(C)) of its proposed expenditures for the next fiscal year on every one of an enormous

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[35] It is difficult to believe that Congress would have imposed such a burdensome requirement on an already over-burdened budget process without expressly saying so. The complexity of the process 15 years ago—when it was less complicated than it is now—was described in A. Wildavsky, *supra*, at 10, as follows:

> There are cases in which one might do better if one had endless time, and unlimited ability to calculate. But time is in terribly short supply, the human mind is drastically limited in what it can encompass, and the number of budgetary items may be huge, so that the trite phrase "A man can only do so much" takes on real meaning.
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> * * * * *
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> Aside from the complexity of individual budgetary programs, there remains the imposing problem of making comparisons among different programs that have different values for different people. This involves deciding such questions as how much highways are worth as compared to recreation facilities, national defense, schools, and so on down the range of governmental functions. No common denominator among these functions has been developed. No matter how hard they try, therefore, officials in places like the Bureau of the Budget discover that they cannot find any objective method of judging priorities among programs. How, then, do budget officials go about meeting their staggering burden of calculation?

variety of programs (see *The Budget of the United States Government, Fiscal Year 1980*, Appendix 537-614 (1979)). In preparing such statements the Department would be required to set forth, among other things, "any adverse environmental effects which cannot be avoided should the proposal be implemented" and "alternatives to the proposed action." 42 U.S.C. 4332(2)(C)(ii), (iii). Such an analysis could be achieved within the time constraints of the budget process only through Herculean labor, large staffing additions, or, as the court of appeals noted, trivialization of the process.[36]

Moreover, the requirement that an EIS be prepared by the agency at the time it submits its budget request to OMB would conflict with the political nature of the presidential budget process and impair the confidentiality the process requires. It has long been recognized that "[t]he size and shape of the budget is a matter of serious contention in our political life. Presidents, political parties, administrators, Congressmen, interest groups, and interested citizens vie with one another to have their preferences recorded in the budget. * * * In the most integral sense the budget lies at the heart of the political process." A.

[36] The difficulty of the task can be illustrated by the requirement that "alternatives to the proposed action" be considered. It is difficult to see how the agency could exhaust the reasonable "alternatives" to its budget submission; not only are different departmental budget totals an "alternative" to the submission, but there are innumerable variations on how each of the alternative totals could be allocated among departmental subdivisions and how each of the subdivisions could allocate their share among different program objectives.

A. Wildavsky, *supra*, at 4-5. See also page 27, *supra*.[37] Congress has been sensitive to the President's political role and need for flexibility in this process and has been sparing in its imposition of procedural and informational requirements, stressing that the process of preparing the Budget requires "cooperative efforts" between the President and the Congress.[38] Such cooperation involves the interaction of two fundamental constitutional responsibilities: that of the Congress to lay taxes and appropriate moneys (Art. I, § 8), and that of the President to recommend to Congress "such Measures as he shall judge necessary and

[37] "The focus of the budget preview process on program issues and analytical studies should not obscure the fact that budget making is and always will be a *political* process, and at the agency level the politics of budget making are important in several ways." J. Ott & A. Ott, *Federal Budget Policy* 31 (3d ed. 1977). See also, Lawton, *supra*, at 171-172; N. Polsby, *Congress and the Presidency* 110-129 (2d ed. 1971).

[38] The Senate Report on the 1974 amendments to Section 201(a) of the Budget and Accounting Act (see page 38, *supra*) stated (S. Rep. No. 93-688, 93d Cong., 2d Sess. 70 (1974)):

> The committee believes that reporting requirements should remain as flexible as possible and should be placed in statutory language only when absolutely necessary. The committee believes that the cooperative arrangement provided in title VIII can result in steady progress toward standardization and can facilitate continuing revision and modifications as congressional information needs change over the years. But it also should be clear that, whenever cooperative efforts prove unsatisfactory, Congress may enact such legislation as is necessary to ensure that congressional reporting requirements are met.

expedient" (Art. II, § 3). It would, at the least, raise questions concerning the proper separation of powers if Congress were to enact legislation restricting the President's ability to exercise his discretionary political judgment in the preparation of the presidential Budget. Far from evidencing any intent to do that, Congress has sought to concentrate that political discretion in the President by assigning to him the personal responsibility for transmitting the Budget and directing its preparation (31 U.S.C. 11(a), 16), and by generally prohibiting federal agencies from submitting independent appropriations requests to Congress (31 U.S.C. 15).

Application of the EIS requirement to agencies at the time they submit budget requests to OMB would threaten the essential political discretion exercised by the President in the budget process. Section 102(2)(C) of NEPA provides that copies of impact statements "shall be made available * * * to the public as provided by [the Freedom of Information Act, 5 U.S.C. 552]." It is our view, as discussed earlier (pages 30-31, *supra*), that an agency's budget submission to OMB is a "predecisional" document that is exempt from disclosure under the Freedom of Information Act. See *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975).[39] The

[39] When Congress extended coverage of the Freedom of Information Act in 1974 to "the Executive Office of the President," Pub. L. No. 93-502, 88 Stat. 1561, the Conference Committee Report noted that the term was "not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 15 (1974). The regulations governing OMB, 5 C.F.R. 1303.20(b) (1978), state that certain units of OMB exist solely to advise the President and are thus exempt from the FOIA. OMB's budget preparation activites fall within this exemption (*ibid.*).

court of appeals concluded, however, that the agency's submission is a final "proposal for legislation" under NEPA and, as such, is subject to the public disclosure requirement (Pet. App. 22a).[40] This compelled disclosure of individual agencies' policy assessments and budget requests would fragment the development of the presidential budget in a manner contrary to the intention and requirements of the Budget and Accounting Act, 1921, 31 U.S.C. 11, 15. Indeed, it would tend toward the political fragmentation of the President's cabinet and Administration in a way that could fundamentally alter the President's role. By impairing the confidentiality of communications within the Executive Branch, this disclosure would injure the President's interest in speaking for his Administra-

[40] The court opined that the problem of disclosure "may be capable of resolution in a manner that presents program proposals in terms that permit an environmental analysis, without disclosure of dollar projections or other betrayal of genuine budget confidence" (*ibid.*). If the court was correct in concluding that agency budget submissions to OMB constitute final "proposals," its suggestion that the final EIS need not disclose the proposal and its alternatives is difficult to understand. In any event, even a limited disclosure of the kind discussed by the court would reveal independent agency policy assessments that are currently and appropriately withheld as confidential advice for the President.

tion, with a single voice, on the inherently political judgments expressed in the Budget.

These results were not intended by Congress in enacting NEPA. Congress was well acquainted with the tradition that agency budget requests remain confidential until the President transmits the Budget to Congress, and had itself enacted the prohibition in Section 206 of the Budget and Accounting Act, 31 U.S.C. 15, against disclosure to Congress or to congressional committees of an agency's appropriations request "unless at the request of either House of Congress." The practice of confidentiality in the presidential budget-making process has been confirmed in directives issued to agencies by OMB (and its predecessor, the Bureau of the Budget) since the 1930's (A. 225, 231, 242-243).[41] The current directive, OMB Circular A-10, ¶ 3 (Rev. Nov. 12, 1976) states (Pet. 19):[42]

> *Requirements for confidentiality prior to official transmittal.* The confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. Presidential budget decisions are not final until the budget itself is transmitted to Congress. Amendments to the budget and supplemental appropriation requests may also follow the transmittal of the budget. Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

[41] Charles G. Dawes, the first Director of the Budget, emphasized in BOB Circular No. 49 (Dec. 19, 1921) the practice that agency budget requests were not to be submitted directly to Congress but only to the Bureau of the Budget and the President. C. Dawes, *The First Year of the Budget of the United States* 161-163 (1923).

[42] A prior, similar version of Circular A-10 is quoted in the dissenting opinion of Judge MacKinnon (Pet. App. 44a).

Congress has given attention to this practice on several occasions and has altered it only with respect to three specific agencies.[43] It is difficult to conceive that, in enacting the National Environmental Policy Act, Congress silently intended to undermine the confidentiality and reshape the character of the presidential budget process by compelling the public dissemination of individual agency budget requests, in conflict with longstanding administrative and statutory requirements.

b. The court of appeals recognized that, if every agency budget request were a "proposal for legislation" under NEPA, the statute would produce un-

[43] The Consumer Product Safety Commission, the Commodity Futures Trading Commission, and the Interstate Commerce Commission are required to submit their appropriations requests to Congress at the same time they submit them to OMB and the President. Consumer Product Safety Act, Section 27(k)(1), 15 U.S.C. 2076(k)(1); Commodity Futures Trading Commission Act of 1974, Section 101(9(A)), 7 U.S.C. 4a(h)(1); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, Section 311, 90 Stat. 60 (31 U.S.C. 11(j)).

workable results (Pet. App. 17a, 22a-23a).[44] The court therefore attempted to devise "a limiting principle" that would allow some application of NEPA in the budget process "[without] overburdening NEPA by spreading its mandate too widely" (Pet. App. 15a, 16a). The court concluded that, under a "rule of reason," an agency's budget request should be deemed a "proposal for legislation" under Section 102(2)(C) only when (1) the contemplated appropriation would "significantly change[] the status quo" or (2) "when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review" (Pet. App. 16a-17a). The court reiterated that "[w]hen there is such a new look [at the agency's program] the ensuing request for appropriations is a 'proposal for legislation' under NEPA" (*id.* at 18a).

The "limiting principle" adopted by the court of appeals is as uncertain as it is unsupported. The court of appeals' analysis provides sparse guidance to en-

[44] The district court suggested that its ruling would have only a limited effect because it would only apply to budget requests "significantly affecting the quality of the human environment" under Section 102(2)(C) (Pet. App. 55a). The court of appeals correctly observed, however, that this phrase has received a broad application and could apply, for example, to activities of the ICC and the SEC (Pet. App. 14a n.27) (citing *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320-321, 322-327 (1975), and *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689 (D.D.C. 1974)). See also, *e.g.*, *Trinity Episcopal School Corp.* v. *Romney*, 523 F.2d 88, 93 (2d Cir. 1975) (NEPA applicable to HUD projects and "quality of urban life").

able agencies and OMB to determine when a budget request contemplates action that "significantly changes the status quo," or when it involves a "new look" or "ushers in a considered programmatic course following a programmatic review" (Pet. App. 17a). The court's decision "would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decision making process of the agencies, and would invite litigation." *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406. Moreover, it has no foundation in the statutory language, resting instead on "a balancing of court-devised factors" comparable to the approach this Court rejected in *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.[45] The "limiting principle" that Congress itself employed in enacting Section 102(2)(C) was to create an EIS requirement for "legislation" but not for "appropriations."

II. SECTION 102(2)(B) OF NEPA DOES NOT IMPOSE A JUDICIALLY ENFORCEABLE OBLIGATION ON OMB TO PROMULGATE GUIDELINES DIRECTING OTHER AGENCIES TO PREPARE ENVIRONMENTAL IMPACT STATEMENTS TO ACCOMPANY BUDGET REQUESTS

The court of appeals concluded that Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), imposes a duty on OMB "to develop methods and procedures

[45] Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 549 (1978), where it was observed that a court has no authority to impose on agencies "its own notion of which procedures are 'best' or most likely to further some vague, undefined public good" (footnote omitted).

to implement the NEPA obligation to provide environmental impact statements to accompany those proposals on budget and appropriations that are proposals for legislation" (Pet. App. 23a). For the reasons set forth above, we submit that budget requests by executive agencies are not "proposals for legislation" under Section 102(2)(C) of NEPA and that neither OMB nor any other agency is thus required to prepare an EIS in connection with budget submissions. It follows that, contrary to the court's holding, NEPA imposes no duty on OMB to advise other agencies concerning their EIS responsibilities in the budget process.

But even if we assume that Section 102(2)(C) requires agencies to prepare impact statements in connection with "some but not all" budget requests, as the court of appeals held (Pet. App. 19a-20a), the court erred in concluding that Section 102(2)(B) imposes an obligation on OMB to promulgate EIS guidelines for other agencies.

A. Section 102(2)(B) provides that all federal agencies are to

> identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.

Nothing in this provision suggests that OMB is directed, or even authorized, to adopt procedures to

guide other agencies concerning the independent responsibilities those agencies may have under Section 102(2)(C) to prepare environmental impact statements.

Instead, Section 102(2)(C) itself provides that the EIS is to be prepared "by the responsible official" for the agency that makes a "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." Thus, as Judge MacKinnon concluded in his dissent (Pet. App. 46a-47a), it is the Department of the Interior, not OMB, that is responsible under NEPA for determining when an EIS should be prepared in connection with any "proposals for legislation" made by that Department. See also *Hanly* v. *Kleindienst*, 471 F.2d 823, 828 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). The court of appeals erred in relying on the generalized language of Section 102(2)(B) to reallocate to OMB a responsibility that Congress in Section 102(2)(C) assigned to the individual agencies.

The entity Congress created to assist other agencies in implementing NEPA is, as Section 102(2)(B) itself recognizes, the Council on Environmental Quality, not OMB. See pages 40-43, *supra*. The Council's responsibilities have been further defined within the Executive Branch by Executive Order No. 11991, *supra*, directing CEQ to promulgate regulations to be followed by other agencies in the performance of their NEPA obligations. The Council's regulations provide that, when more than one agency is involved

in the development of a proposal, the agencies are to resolve between themselves which will be primarily responsible for the environmental inquiry. Section 1501.5(c), 43 Fed. Reg. at 55993. If the agencies fail to achieve agreement, they may apply to the Council to designate the agency to assume primary responsibility. Section 1501.5(e), 43 Fed. Reg. at 55993. The court of appeals' mandate to OMB to direct the performance of NEPA responsibilities by other agencies thus conflicts not only with the statute, but also with the reasonable procedures adopted by CEQ for resolving conflicts among agencies in the implementation of NEPA.[46]

Furthermore, Section 102(2)(B) has been held to require only "that some rudimentary procedures be designed to assure a fair and informed preliminary decision" on the environmental significance of proposed actions. *Hanly* v. *Kleindienst, supra*, 471 F.2d at 835. See also *City of New Haven* v. *Chandler*, 446 F. Supp. 925, 936 (D. Conn. 1978). The statute does not require an agency to adopt any particular procedural format, but only to make a "good faith attempt" to give appropriate consideration to environmental factors. *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 492 F.2d 1123, 1133 (5th Cir. 1974). If we assume arguendo that, as the court of appeals concluded, individual agencies are under an obligation to prepare an EIS in connection with "sig-

[46] As discussed *supra*, at pages 41-42, in issuing its regulations CEQ concluded that budget requests do not constitute proposals for legislation.

nificant change" or "new look" budget requests, OMB is entitled to rely on agencies to perform that responsibility in good faith.[47] There is no basis in Section 102(2)(B) for imposing on OMB an obligation to establish an additional layer of procedures directing the agencies to accomplish a responsibility which the court has held that they are independently required to perform.

B. For reasons similar to those just discussed, respondents lack standing to assert the claim they raise under Section 102(2)(B). The court of appeals did not consider separately the questions whether respondents have standing to sue under Section 102(2)(C) and Section 102(2)(B). The court concluded generally that if respondents' members use wildlife refuge areas that are alleged to be adversely affected by spending decisions for the Refuge System, they have standing in this case (Pet. App. 8a). We concede that members of the respondent organizations use wildlife refuge areas and that their use may be adversely affected by the environmental impact of decisions reducing the funds available for operation and maintenance of the Refuge System. Furthermore, when an agency fails to prepare an EIS that is required by Section 102(2)(C), and this failure leads to a governmental decision adverse to the environmental interests that NEPA is designed to protect, it would appear that the alleged injury

[47] Agencies are entitled to a presumption of regularity in their proceedings. *E.g., United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

"fairly can be traced" to the allegedly unlawful action. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 n.25 (1976). We therefore do not dispute that respondents have standing to claim that an EIS is required under Section 102 (2) (C) in the context of this case (though, of course, we dispute that claim on its merits).

Respondents do not have standing, however, to raise their claim under Section 102(2)(B). Respondents' claim is that Section 102(2)(B) imposes a duty on OMB to issue guidelines to elaborate the asserted responsibility of federal agencies to prepare and disseminate environmental impact statements during the budget process (Pet. App. 20a). But respondents cannot show, as they must, that OMB's failure to adopt such guidelines has "caused" another agency's failure to prepare an EIS in connection with its annual budget request. See *Simon*, *supra*, 426 U.S. at 45 n.25; *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

Guidelines adopted by OMB would neither add to, nor detract from, the duty of each agency to prepare an EIS when Section 102(2)(C) so requires.[48]

[48] Respondents suggest (Br. in Opp. 16 n.15) that, if OMB had issued guidelines informing agencies of their obligation to submit an EIS in connection with budget requests, "there can be little doubt" that agencies would have complied. This suggestion is circular. If agencies are required under Section 102(2)(C) to submit an EIS with their budget requests, advice to the same effect from OMB would be unnecessary and would add nothing.

Any claim that respondents are injured by the absence of guidelines requiring agencies to do what (by hypothesis) they are already required to do by statute is based on the mere speculation that, without such guidelines, agencies would ignore their independent responsibility under Section 102(2)(C). Respondents' theory of injury is at odds with the customary rule that agencies are entitled to a presumption of regularity in their proceedings. See note 47, *supra*. Respondents' "unadorned speculation[s]" do not "suffice to invoke the federal judicial power." *Simon*, *supra*, 426 U.S. at 44. See also *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1979

* The Solicitor General is disqualified in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 581 F.2d 895. The opinion of the district court (Pet. App. 49a-58a) is reported at 395 F.Supp. 1187.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 12, 1978, and the petition was filed on

that date. The petition was granted on January 8, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether budget requests by federal agencies which usher in considered programmatic courses following programmatic reviews of ongoing programs, and which would significantly affect the quality of the human environment if adopted, constitute "proposals for legislation" or "proposals for major Federal action" requiring the preparation of environmental impact statements under Section 102(2)(C) of the National Environmental Policy Act of 1969.

2. Whether Section 102(2)(B) of the National Environmental Policy Act of 1969, which applies to all federal agencies, requires the Office of Management and Budget to develop methods and procedures which will guide agencies in determining which budget requests must be accompanied by environmental impact statements.

STATUTES AND REGULATIONS INVOLVED

Respondents adopt by reference all of the Statutes and Regulations quoted at pages 2-5 of petitioners' brief, in accordance with Supreme Court Rules 40(3). Respondents call to the attention of the Court the following additional regulations and guidelines of the Council on Environmental Quality:

Sections 1506.8(a) and 1508.18 of Title 40, Code of Federal Regulations, as adopted by the Council on

Environmental Quality on November 29, 1978, state in part (43 Fed. Reg. 55,990, 56,001-02, 56,004-05):

> *§ 1506.8 Proposals for legislation.*
>
> (a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. . . . A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. . . .
>
> *§ 1508.18 Major Federal action.*
>
> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. . . .
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; . . .
>
> (b) Federal actions tend to fall within one of the following categories: . . .
>
> (2) Adoption of formal plans such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.
>
> (3) . . . systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

Sections 1500.3(b), 1500(a)(1), and 1500.12 of Title 40, Code of Federal Regulations (1978) (in force until July 30, 1979) state in part:

> *§ 1500.3 Agency and OMB procedures.*
>
> (b) Each Federal agency should consult, with the assistance of the Council [on Environmental Quality] and the Office of Management and Budget, if desired, with other appropriate Federal agencies in the development and revision of the above procedures so as to achieve consistency in dealing with similar activities and to assure effective coordination among agencies in their review of proposed activities. . . .
>
> *§ 1500.5 Types of actions covered by the Act.*
>
> (a) "Actions" include but are not limited to:
>
> (1) Recommendations or favorable reports relating to legislation including requests for appropriations. . . .
>
> *§ 1500.12 Legislative actions.*
>
> (a) The Council [on Environmental Quality] and the Office of Management and Budget will cooperate in giving guidance as needed to assist agencies in identifying legislative items believed to have environmental significance. Agencies should prepare impact statements prior to submission of their legislative proposals to the Office of Management and Budget. . . .
>
> (b) . . . In cases where the scheduling of congressional hearings on recommendations or reports on proposals for legislation which the Federal agency has forwarded to the Congress does not allow adequate time for the completion of a final text of an environmental statement (together with comments), a draft environmental statement may be furnished to the Congress and made available to the public pending transmittal of the comments as received and the final text.

STATEMENT OF THE CASE

The National Wildlife Refuge System (NWRS), administered by the Fish and Wildlife Service of the Department of the Interior, is devoted to the preservation of vital habitats for the nation's wildlife. Over the 76 years of its existence, the System has grown to encompass 390 individual refuges covering 53,000 square miles. Since its inception, the System has been assigned more and more responsibilities. Thus, its scope has expanded from its original emphasis on the protection of migratory waterfowl to include the protection of all endangered wildlife from the depredations of uncontrolled development.

Unfortunately, the Refuge System has suffered from insufficient funds[1] and from confusion concerning its purposes—such as the need to protect wildlife and the desire to accommodate public use and recreation—at the very time its responsibilities have been growing. A primary cause of these problems has been the failure of the Department of the Interior and its Fish and Wildlife Service to give systematic consideration to the environmental impact of proposed levels of funding and proposed areas of emphasis within the System.

---

[1] "While it was acquiring more responsibility, the [National Wildlife Refuge System] was suffering from insufficient funds and from the confusion caused by the need to serve several different purposes, such as protection of the wildlife and accommodation for public use, including recreation." Doyle, *Our National Wildlife Refuges: A Chance to Grow*, 155 Nat'l Geographic 342, 348 (1979).

Acting to remedy this situation, the Sierra Club, the National Parks and Conservation Association (NPCA) and the Natural Resources Defense Council, Inc. (NRDC) filed suit in district court for a declaratory judgment that the Department of the Interior (DOI) and the Office of Management and Budget (OMB) had violated The National Environmental Policy Act (NEPA), the Guidelines of the Council of Environmental Quality (CEQ), and other pertinent regulations and orders "by failing to prepare and consider environmental impact statements with respect to major policy decisions and actions relating to the operation of the National Wildlife Refuge System . . ." and "by failing to prepare and consider environmental impact statements with respect to proposed budgets for the operation of the National Wildlife Refuge System" (A. 19-20).[2] Sierra Club, NPCA and NRDC also requested a declaratory judgment that OMB had violated NEPA, the CEQ Guidelines, and Executive Order 11514 by failing to develop and promulgate methods and procedures to comply with NEPA (A. 20). The Complaint also requested the court to enter an order requiring DOI and OMB to comply with NEPA, the CEQ Guidelines, and other pertinent regulations and orders (A. 20).

During the pendency of the district court action, DOI began preparation of a "programmatic statement" discussing the operation and administration of the Refuge System, including certain funding alternatives (Pet. App. 2a). This programmatic statement examined the environmental effects of managing the System over a ten-year period at various levels of appropriations. It did not discuss any specific budget proposals.

[2] "A." refers to the appendix to the briefs filed in the court of appeals on March 19, 1976. By order of the Court entered February 21, 1979, respondents' motion to dispense with the filing of an appendix was granted.

Following initial discovery, both sides filed motions for summary judgment. The district court (per Judge Pratt) ruled in favor of the claims presented by respondents (Pet. App. 49a-58a). Judge Pratt held that budget requests of the Fish and Wildlife Service were recommendations or reports on "proposals for legislation and other major Federal actions" with a significant effect upon the environment (Pet. App. 51a-52a). Judge Pratt rejected petitioners' claims that compliance with NEPA in the budget context would not be possible and that the budget process is confidential until the President forwards the combined federal budget to Congress (Pet. App. 52a-57a).

Petitioners moved to stay the case pending completion of the programmatic statement dealing with the Refuge System, claiming that the programmatic statement would satisfy NEPA requirements (A. 579). The court refused to stay the case, holding that, although the "programmatic statement" under preparation by DOI might serve as a basis for subsequent supplemental statements and analyses, the programmatic statement did not supplant the need for an environmental impact statement (EIS) accompanying each annual budget request for the Refuge System (Pet. App. 58a). In an unpublished Order, Judge Pratt entered a declaratory judgment in accordance with his opinion and also required OMB to develop methods and procedures to comply with NEPA (Pet. App. 61a-62a).

On appeal, the court of appeals (per Judge Leventhal) reversed in part, ruling that an EIS is not required for an agency's routine request for annual budget approval and appropriations for continuance and management of an ongoing program, but that an EIS is required "when the request . . . is one that ushers in a considered programmatic course following a programmatic review" (Pet. App. 15a-18a). The court of appeals affirmed that part of the district court's opinion which required OMB to develop methods and procedures for implementing NEPA in the budget process (Pet. App. 23a). Judge MacKinnon dissented.

SUMMARY OF ARGUMENT

The National Environmental Policy Act (NEPA) embodies a congressional desire that federal agency actions such as the preparation of requests for appropriations legislation be the product of thorough consideration of their potential environmental consequences. Congress was familiar with the policy implications of agency budget decisions, and intended those critical decisions to be influenced by the consideration of environmental factors. Congress desired budget requests which usher in a considered programmatic course following a programmatic review of ongoing programs to be accompanied by environmental impact statements demonstrating that environmental concerns have been considered in the decision-making process.

The plain language of Section 102(2)(C) of NEPA demonstrates the congressional intent to apply the environmental analysis of the impact statement to the budget process. Section 102(2)(C) directs every federal agency to include an impact statement "in every recommendation or report on proposals for legislation

and other major Federal actions significantly affecting the quality of the human environment . . . ." As the product of the Legislative branch, a congressional appropriation is "legislation." An appropriation is also a "major Federal action." Furthermore, the final agency request for budget approval and appropriations is a "proposal" as that term is used in Section 102(2)(C). Agencies are statutorily required to prepare such requests each year. The actual requests, as products of many months of intensive work and analysis, possess sufficient finality to be deemed "proposals." Inclusion of budget requests in the EIS process effectuates rather than strains the words of NEPA and the intent of Congress.

The enforcement of NEPA's procedural requirements as they apply to the budget process will not significantly burden agencies. Most agency budget requests will not be accompanied by impact statements due to the incremental nature of the budget process. An agency need prepare an impact statement only when its budget request proposes a significant change in an ongoing program, after a careful review of that program. The agency will have adequate time within which to prepare the required statement. Recently adopted CEQ Regulations will further simplify and ease compliance with NEPA as applied to the budget process. Most important, federal decisionmaking will be improved in the manner intended by Congress.

The federal budget process is amenable to NEPA compliance. Confidentiality is not built into the budget process by constitutional requirement, statutory mandate or practical necessity. Public disclosure of impact statements on legislative proposals normally awaits Presidential transmission of the proposals to Con-

gress. Even if advance disclosure is required, such disclosure would not prevent the President from carrying out his duties, and may enhance his performance of them. The Budget and Accounting Act of 1921 sets up a process by which agency budget requests are submitted to Congress through the President. That Act does not require the exclusion of all information in those requests from environmental impact statements until the President forwards the combined federal budget to Congress. There is no evidence and no policy which indicate that the budget process will work less efficiently if impact statements are prepared and made available prior to transmission of the budget to Congress. In any event, NEPA has proven sufficiently flexible to allow for compliance with its procedural requirements while still preserving any necessary confidentiality.

Section 102(2)(B) of NEPA requires OMB, the principal agency charged with supervision of the budget process, to identify and develop methods and procedures by which agencies will be guided in their compliance with NEPA as applied to the budget process. Congress intended for OMB to play a central role in guiding agencies in their efforts to meet their budgetary duties under NEPA. OMB has demonstrated its ability to provide such guidance. Furthermore, respondents have standing to pursue this claim. The absence of OMB guidelines has led to a failure by agencies to identify and meet their responsibilities under NEPA with respect to preparation of impact statements on budget requests. As a result, respondents have suffered substantive and procedural injuries.

ARGUMENT

I. CONGRESS INTENDED TO APPLY THE PROCEDURAL REQUIREMENTS OF SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO THE AGENCY BUDGET PROCESS.

Congress passed the National Environmental Policy Act (NEPA) in 1969 to provide all federal agencies and officials with a clear and forceful "legislative mandate and a responsibility to consider the consequences of their actions on the environment." S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969). Congress intended that adequate consideration of environmental concerns in decision-making processes characterize "the ongoing activities of the regular Federal agencies." *Id.*

In enacting NEPA, Congress recognized that federal actions could have significant direct and indirect effects on the environment, but that the decisions which lead to those actions often are made with only occasional and incidental consideration of their potential environmental consequences. NEPA's strong response, a government-wide policy of restoring, protecting and enhancing the nation's environment by the use of "all practicable means," 42 U.S.C. § 4331(a), is more than a hollow declaration. Congress "did not intend the Act to be . . . a paper tiger." *Calvert Cliffs' Coordinating Committee, Inc. v. AEC,* 449 F.2d 1109, 1114 (D.C.Cir. 1971). The procedural requirements of NEPA establish a high standard for all agencies; one which must be vigorously enforced. *Id.* [3]

[3] "When the Congress required environmental impact statements it was because previous practice was inadequate—agencies' planning and decisionmaking procedures had ignored or misjudged significant environmental impacts and would continue to do so unless a publicly accountable document was prepared and its criticism considered *before taking* a major action" [1975] CEQ Ann. Rep. 628 (emphasis added).

A. NEPA Embodies a Clear Congressional Intent to Consider Environmental Factors in Federal Decisionmaking.

In the decade since its passage NEPA has fundamentally altered the processes of federal decisionmaking. Compliance with the procedural, "action-forcing" requirements of NEPA—which were intended to ensure consideration of the environmental effects of proposed and alternative courses of action—has led to substantial improvements in federal decisions affecting the environment.[4] More important, NEPA's objective of helping to protect and enhance the quality of the human environment has been accomplished. Note, *NEPA's Forgotten Clause: Impact Statements For Legislative Proposals,* 58 B.U.L. Rev. 560, 561 (1978). In short, at a time when the Executive and Legislative branches of our government have emphasized the need to be management oriented (by the use, for example, of economic analyses, zero-based budgeting and cost/benefit approaches), the action-forcing mandate of NEPA is an invaluable management tool.[5]

[4] The Council on Environmental Quality (CEQ) so reported to the President in March, 1976, after concluding a year-long study of federal agencies' experience in implementing Section 102(2)(C) of NEPA. Council on Environmental Quality, Environmental Impact Statement: An Analysis of Six Years' Experience by Seventy Federal Agencies 21-25 (1976) [hereinafter cited as Analysis].

[5] Agencies' efforts to use NEPA in this way have been successful. For example, the National Park Service reported in 1975 that its implementation of NEPA had allowed "[m]anagers at all levels [to] make better informed decisions (' . . .') In these times of fiscal restraints, we also ensure that we are not duplicating services

Section 102(2)(C) of NEPA requires every Federal agency to prepare an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Petitioners now seek judicial approval for a complete exemption of the federal budget process from the procedural requirements of NEPA.[6] Under their interpretation, a request

provided by others and thus spending funds unnecessarily." Analysis, *supra* note 4, at E-1. The Service also emphasized that:

> NEPA has sharpened our planning process. It has become more systematic, comprehensive, and provides an umbrella or structure for a myriad of management actions we must take daily. Long term, this comprehensive planning will reduce costs, minimize labor requirements for operation and maintenance of facilities, and aid us in mitigating our adverse actions as well as provide us with a system for monitoring our past decisions. *Id.* at E-2.

Referring specifically to EISs, the Park Service described them as "useful tools in helping us reach our objectives," and concluded:

> [I]f we use NEPA as a decisionmaking management tool rather than thinking of it as a nemesis, our decisions will be of greater benefit to the resources we manage and the public we serve.

Id.

[6] The procedural posture of the instant case makes it difficult for respondents to pinpoint exactly what petitioners are requesting of the Court as to the first question presented. The issue below was whether routine annual budget requests must be accompanied by environmental impact statements. This issue was resolved in favor of petitioners and has not been appealed by respondents. Indeed, the court of appeals adopted a position advocated by petitioners (that "the programmatic EIS is . . . an acceptable method

for budget approval and appropriations which "proposes a considered programmatic course following a programmatic review" (Pet. App. 23a), is not a recommendation or report on a proposal for legislation [7] or

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of complying with NEPA in circumstances of annual budget-making") (Brief for Appellants at 33), a position petitioners now reject in claiming that they have *no* duty under NEPA with regard to proposals for appropriations legislation.

Notwithstanding petitioners' assertion that the court of appeals' judgment will require them to prepare additional impact statements (Brief for Petitioners at 22, n.15), there is no case before the Court in which any agency has failed to prepare a required EIS. The court of appeals expressly noted that there was no issue before it regarding "whether, or in what instance, a 'new look' may be required" (Pet. App. 17a). Petitioners, having no facts upon which to base their arguments, have been forced to argue the theoretical issue of a complete exclusion of the budget process from NEPA.

[7] The requirement of the impact statements for legislative proposals, including proposals for appropriations legislation, has gone largely unheeded since NEPA's passage. *See generally,* Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals,* 58 B.U.L. Rev. 560 (1978) [hereinafter cited as Note]. In addition to characterizing the court of appeals' decision as one which "both supports the policy behind NEPA and evinces a sensitivity for the practical difficulties of preparing an EIS" (*id.* at 566), the author of the Note, after reviewing the legislative history of NEPA and judicial efforts to articulate situations where an EIS would be required, emphasizes:

> In NEPA, Congress has determined an efficient balance; the courts should not attempt to tip the scales by interpreting the legislative proposal provision narrowly. If there is any question whether an EIS should issue, the statement should be prepared, and Congress should decide the proper use for the information.

Id. at 568.

See also Comment, *Impact Statements on Legislative Proposals: Enforcing the Neglected Half of NEPA's Mandate,* 7 ELR 10,145 (1977); Comment, *NEPA and the Budget Process: D.C. Circuit Announces EIS Requirement Applies to 'Non-Routine' Annual Requests,* 8 ELR 10,126, 10,129 (1978) ("[t]he Court's ruling seems to strike a reasonable balance between applying the broad language of the Act concerning impact statements for 'proposals for legislation' and avoiding the pitfalls of trivializing the EIS process and undercutting the traditional confidentiality of budgetary requests.")

for major Federal action.[8]

Petitioners incorrectly imply that Congress intended to exclude the budget process entirely from the provisions of NEPA (Brief for Petitioners at 37-39).[9] In so

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[8] Respondents have always argued this first issue in the alternative: that a request for appropriations legislation is either a recommendation or report on a proposal for legislation or on a proposal for major Federal action. *See* Brief for Appellees at 24 *et seq.* Both petitioners' statement of Question 1, and their Brief in substance, except note 34, fail to discuss this other important dimension of Section 102(2)(C); although there seems to be implicit recognition in note 34 that agency requests for budget approval and appropriations may, in some contexts, fall within this provision, if the budget submission constitutes a "proposal." *See* discussion, *infra* at 38-41.

[9] Any intent by Congress to exclude such a major and commonly accepted function of the legislative process from the strong mandate of NEPA, which twice has been before the Congress for amendment, would have been clearly stated. Insofar as the legislative proposal provision is concerned, the legislative history does not reflect careful consideration of any definition of the word

doing, petitioners ignore the express policy of NEPA, as well as the clear congressional intent regarding the role of the impact statement procedure. Further, the consistent interpretations of the Council on Environmental Quality (CEQ), which was established by NEPA, and of every court which has ruled upon the coverage of Section 102(2)(C), are squarely at odds with petitioners' contention. By construing NEPA in a vacuum, petitioners have failed adequately to consider the overall purposes of the Act.

NEPA was passed "to establish, by Congressional action, a national policy to guide Federal activities which are involved with or related to the management of the environment or which have impact on the quality of the environment." S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969). The Senate Committee which forwarded NEPA to the full Senate unanimously agreed that established public policies and existing government institutions were inadequate to deal with mounting environmental problems. *Id.* at 4. This relevant statutory language and legislative history is important to demonstrate that NEPA was created as the vehicle by which federal decisions would be infused with an environmental element.

Congress did not limit itself to a statement of policy in NEPA. In Section 102(2)(C) it required that agencies prepare environmental impact statements in conjunction with "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Senator Jackson, the leading proponent of NEPA in the Senate, called the impact statement requirement an "action-forcing procedure" designed to ensure that the goals and principles of NEPA were observed. 115 Cong. Rec. 19009 (1969) (remarks of Sen. Jackson).[10]

Federal agencies are directed by NEPA to achieve the goals of Section 101 by considering environmental values and effects in both the planning and decision-making processes. Congress realized that compliance with Section 102(2)(C) might be difficult for some agencies; and that agencies would be tempted to escape NEPA's clear mandate by pleading administrative burden. Nevertheless, Congress required strict compliance "to the fullest extent possible." 42 U.S.C. § 4332. It was intended that an agency would comply with the requirements of Section 102(2)(C) "unless the existing law applicable to such agency's operations does not make compliance possible." *See* H.R. Rep. No. 765, 91st Cong., 1st Sess. 9 (1969) (conference report). Furthermore, agencies were not to construe their existing statutory authorizations in a manner designed to avoid com-

"proposal" or of the phrase "recommendation or report on." The only reference to the provision is contained in a statement in the Senate Report that "[e]ach agency which proposes *any* major actions, such as project proposals, *proposals for new legislation*, regulations, policy statements, or expansion or *revision of ongoing programs*" would consider the potential environmental consequences of the action, and would prepare an EIS if necessary. S. Rep. No. 296, 91st Cong., 1st Sess. 20 (1969) (emphasis added).

[10] The role of the impact statement as an "action-forcing" procedure was repeatedly emphasized. *See, e.g.*, S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969); *id.* at 19; 115 Cong. Rec. 40,416 (1969) (remarks of Sen. Jackson). *See also National Environmental Policy: Hearing Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969) (statement of Lynton K. Caldwell); Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ELR 50,035, 50,040 (1971).

pliance. *Id. See Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787-88 (1976); *Davis v. Morton,* 469 F.2d 593, 598 (10th Cir. 1972).

In sum, the purposes of NEPA are best served by the preparation of impact statements whenever proposed federal actions may have a significant effect on the environment. Decisions which will have no significant effect on the environment are, of course, exempt from the EIS requirement. But the intent of Congress is defeated when environmental factors are not considered before commitments to courses involving potentially serious environmental effects are, as a practical matter, not likely to be altered. Such a commitment is inherent in an agency's final request for budget approval and appropriations, which "proposes a considered programmatic course following a programmatic review" (Pet. App. 23a). The agency's failure to provide for consideration of the important environmental consequences of budget decisions is contrary to the statutory language and the legislative history of NEPA.

B. An Agency's Budget Request May Involve Environmental Consequences Which Congress Intended to be Examined by the Agency in an EIS.

The budget process is a crucial tool of policymaking. Before the President formally transmits the combined federal budget to Congress, the final decision made by an individual agency in preparing and presenting a final budget proposal for congressional consideration has already had broad policy ramifications. This is particularly true when the agency undertakes a thorough, non-routine review of an ongoing program in connection with its proposal for appropriations legislation. In the words of the court of appeals, "[a] review of such a nature reflects choices that should under NEPA be made in the light of a full consideration of pertinent environmental consequences and alternatives" (Pet. App. 17a). Judge MacKinnon in his dissent recognized that such non-routine requests would warrant the preparation of an EIS. His view, however, was that "in this case . . . merely . . . a routine, continuing [annual] request for funding" had been initiated (Pet. App. 42a). He also suggested that "where a decision is made to request no funding at all, thus terminating a program, perhaps such action could plausibly be considered 'major' . . ." (*id.*), thereby requiring preparation of an EIS.

While the legislative history is sparse regarding the application of the procedural safeguards of Section 102(2)(C) to the budget process, it is logical to assume that application was intended. Not only was Congress fully aware of the critical agency decisions involved in budget requests, but it also specifically intended the Budget Bureau (OMB) to play a major role in implementing environmental standards under NEPA throughout the federal establishment. The Senate Committee explicitly noted that the Bureau of the Budget,[11]

[11] At the time of the enactment of NEPA, the Bureau of the Budget was still in existence. The Bureau was created by an Act of Congress in 1921. Budget and Accounting Act of 1921, Ch. 18, Section 207, 42 Stat. 22. In Reorganization Plan No. 1 of 1939, 53 Stat. 1423, the Bureau of the Budget was transferred from the Treasury Department to the Executive Office of the President. In Reorganization Plan No. 2 of 1970, 84 Stat. 2085, the Bureau of the Budget was abolished and its budgetmaking functions were transferred directly to the President, who then delegated this responsibility to the newly established OMB. Exec. Order No. 11,541, 35 Fed. Reg. 10,737 (1970).

which performed oversight and assessment functions, had proven to be more adept in considering fiscal, rather than environmental, factors. S. Rep. No. 296, 91st Cong., 1st Sess. (1969). Nevertheless, the new Office of Management and Budget (OMB) was expected to assume the primary responsibility for enforcing the legislative clearance programs. *National Environmental Policy: Hearings Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 116-17 (1969) (remarks of Sen. Jackson and Dr. Lynton K. Caldwell).[12]

Since annual agency budget requests of the kind articulated by the court of appeals will invariably involve environmental impacts and the irreversible and irretrievable commitment of resources, those proposals logically were intended to be covered by Section 102 (2)(C) as either proposals for legislation or for major Federal action. It is unlikely that Congress intended to infuse environmental awareness into every segment of federal decisionmaking, except the influential budget

[12] Congress recognized that "[l]ong range plans requiring legislative implementation over time are especially suitable for a NEPA analysis," W. Rogers, Environmental Law § 7.2, at 715 (1977), and that this would include "quite clearly appropriations requests." *Id.* at 714-15. Only when OMB demonstrated its reluctance to undertake a significant oversight role did CEQ assume that position. *Id.* at 705. From the very start and through two revisions of CEQ's Guidelines, a central role was contemplated for OMB. *See* [1970] CEQ Ann. Rep. 286, 287 (CEQ Interim Guidelines) ("The Bureau of the Budget will issue instructions, as necessary, to take full advantage of existing mechanisms (relating to procedures for handling legislation, preparation of budgetary material . . .)"); 36 Fed. Reg. 7,724, 7,724 (1971) (providing for federal agency assistance from OMB in the development of procedures which, *inter alia,* would identify those agency actions requiring EISs); and the current Guidelines, 40 C.F.R. §§ 1500.3(b), (c) (1978), which technically are in effect until July 30, 1979.

process. No court or commentator has so suggested; nor, until its recent aboutface, has CEQ, the entity specifically entrusted with interpreting the meaning of the action-forcing mandate in NEPA.[13]

The affidavits submitted by Government officials in the instant case demonstrate the thoroughness and complexity of agency budgetary decisionmaking, as well as the finality of the agency's budget request when it is forwarded to OMB. The affidavit of Royston C. Hughes is demonstrative (Pet. App. 73a-78a). The final agency budget request is not the result of ill-informed, last-minute decisions. Rather, an agency undertakes a thorough examination of its programs for up to nine months of each year. Agency officials at the bureau and office levels participate in discussions leading up to the final budget request (*id.* at 76a). These discussions include consideration of departmental "priorities and issues" presented in Program Strategy Papers (*id.*).

By the end of August (four months before the President's transmission of his combined federal budget to Congress), the agency head must make "*final* decisions . . . as to the allocation which the Department would recommend to the Office of Management and Budget . . ." (*id.*) (emphasis added).

The final budget document is forwarded to OMB by the end of September. For the next few months, conferences between the Department and OMB merely establish budget allowances for each Bureau and Office (*id.* at 77a). Although the combined federal budget is formally submitted by the President, the overall changes by both OMB and the President are relatively

[13] *See* discussion, *infra* at 26-33.

minor after the final decisions within the agency have been made in September. An agency head may appeal any changes in his/her final request. Moreover, petitioners have admitted that, at least for the past four years, no major changes were made after the agency budget request for the NWRS was submitted to OMB by the Department of the Interior (Brief for Petitioners at 10 n.6).[14] In short, the final agency budget request is an accurate projection of the ultimate allocation of resources, and is essentially the same budget as that which the agency submits to Congress through OMB and the President.

The agency budget process is not just a study in fiscal management; important policy decisions are made throughout the nine months of careful budgetary soul-searching. The non-budgetary policy implications of the budget process are greater today than they have ever been.[15]

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[14] According to Curtis Bohlen, the Assistant Secretary of Interior for Fish and Wildlife and Parks, the final budget estimates of the Secretary of Interior "resemble very closely both in nature and form the Justification for Appropriations which are [sic] ultimately sent to Congress for each Bureau and agency." (Affidavit of Curtis Bohlen at 3).

[15] The tremendous policy influence of the budget in recent years is due in large measure to its size. Charles Schultze, currently Chairman of the Council of Economic Advisors, has pointed out that the increasing percentage of GNP devoted to the federal budget has given the budget process a far greater role in shaping social policy than was the case only 30 years ago. C. Schultze, The Politics and Economics of Public Spending 14-15 (1968). *See also* H. R. Rep. No. 697, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U. S. Code Cong. & Ad. News 2778, 2783 (federal budget in 1974 was nearly 100 times larger than the budget at the time when the Budget and Accounting Act was passed in 1921); D. Ott and A. Ott, Federal Budget Policy 1 (3d ed. 1977).

Congress recognized the policy implications of budget formation in 1974 when it amended the Budget and Accounting Act to provide for Senate confirmation of the Director and Deputy Director of OMB. *See* Act of March 7, 1974, Pub. L. No. 93-250, 88 Stat. 11. The House Report said:

> [T]he budget is the great judgment book for Federal agencies and activities, recording which shall live and which shall die, which shall prosper and which shall wane. Unlike the situation 50 years ago, when the mix of Federal activities varied little from year to year, the budget now is the 'action forcing' process, involving new program decisions and billions of dollars each year.

H.R. Rep. No. 697, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 2778, 2784. The use of the specific term "action forcing" in the Report is especially significant, for the same term was used in the Senate Report accompanying NEPA to describe the impact statement requirement. *See* discussion at 17 *supra*. Just as the procedural requirements of the budget process force policymakers systematically to consider fiscal issues, so the procedural requirements of NEPA force the same policymakers carefully to consider environmental factors. Congress did not intend the process whereby federal agencies and activities "live and die" to be excluded from the "action-forcing" procedures of NEPA.

Budget decisions have substantial effects on the environment. For example, when budgetary levels for particular Wildlife Refuges are lowered, "the result is generally to reduce sharply the ability of the refuge to support wildlife populations and ultimately to require the replacement of facilities at much higher cost

than that of maintenance and rehabilitation." (Affidavit of John S. Gottschalk, former Director of the Fish and Wildlife Service, A. 407).[16] Congress established the EIS requirement to ensure that significant agency policymaking would include careful consideration of such environmental effects. Environmental effects are, ultimately, economic effects.

Petitioners' view that the budget process is excluded from NEPA is blatantly inconsistent with congressional intent and an understanding of the process itself. The court of appeals' interpretation of Section 102(2)(C) is both sensible and appropriate. Petitioners' contention requires a strained and incorrect application of the language of NEPA.

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[16] As one professional wildlife refuge administrator, long involved in the budgetary processes of the Fish and Wildlife Service has stated:

> The various component programs in the refuge system's budget contribute directly to either the preservation and conservation of wildlife, including near-extinct species; to the management of wildlife habitat; or to the educational and recreational use of the refuges by the public . . . Thus, decisions whether or not to include hunting programs as a part of the refuge program and concomitant decisions whether or not to provide staff to regulate and supervise such hunting programs have significant environmental effects. Similarly, budgetary decisions to vacate refuges may involve direct losses in wildlife production; decisions to defer purchases of disappearing wetlands may contribute directly to the loss of the national migratory bird populations; decisions to eliminate staffing for active management of wildlife habitat may mean such deterioration of habitat that wildlife is lost; deferment of a program for maintenance and rehabilitation of facilities such as water impoundments may mean the direct loss of wildlife habitat and diminished wildlife production; and decisions to eliminate access to certain size or low priority refuges directly affects public use of such refuges for educational and recreational purposes.

(Affidavit of Harry B. Crandell, A. 398).

II. NEPA REQUIRES THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT TO ACCOMPANY AN AGENCY REQUEST FOR BUDGET APPROVAL AND APPROPRIATIONS WHERE THE REQUEST PROPOSES A CONSIDERED PROGRAMMATIC COURSE FOLLOWING A PROGRAMMATIC REVIEW OF AN ONGOING PROGRAM.

A. The Plain Language of Section 102(2)(C) Requires Federal Agencies to Prepare Environmental Impact Statements to Accompany Certain Budget Requests.

1. For Purposes of NEPA, an Appropriation by Congress Is Either Legislation or Major Federal Action.

Under the language of Section 102(2)(C), the impact statement requirement is applicable to the budget process if an agency budget request is either:

> i) a recommendation or report on a proposal for legislation; or
>
> ii) a recommendation or report on a proposal for major Federal action.

42 U.S.C. § 4332(2)(C). Petitioners contend that an appropriation is neither legislation nor a major Federal action (Brief for Petitioners at 34, 45 n.34).[17]

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[17] In their Answer petitioners challenged respondents' standing to sue by a general denial that petitioners had any plans to reduce the funding of the National Wildlife Refuge System with consequent impairment of the Refuge System (Pet. App. 9a). However, petitioners now concede "that respondents have standing to claim that an EIS is required under Section 102(2)(C) in the context of this case . . ." Brief for Petitioners at 60). As petitioners now agree, members of respondents' organizations use the wildlife refuge areas; their use may be adversely affected by the allocation of funds available for operation of the Refuge System; and their injury fairly can be traced to petitioners' actions through the failure to comply with the procedural requirements of NEPA (Brief for Petitioners at 59-60). Respondents so pleaded in their

Petitioners rely heavily on regulations promulgated recently by the Council on Environmental Quality (CEQ) (Brief for Petitioners at 39-44). But these regulations are meaningless unless studied in the light of past administrative history. When so examined, it becomes clear that the new regulations, insofar as they exclude budget requests from coverage under NEPA, are tainted by litigation motive, and hence without value as interpretive tools.

a. The CEQ guidelines and regulations.

On March 5, 1970, the President issued an executive order directing CEQ to issue guidelines to federal agencies for the impact statement process. Exec. Order No. 11,514 § 3(h), 35 Fed. Reg. 4,247, 4,248 (1970). Pursuant to the Order, CEQ promulgated Interim Guidelines on April 30, 1970—just four months after NEPA was signed into law. Under the Guidelines, an environmental impact statement was required for any proposed action. The word "actions" (as in "major Federal actions") was defined to include, among other things, "recommendations or reports relating to legislation and appropriations," as well as "policy-making." *See* [1970] CEQ Ann. Rep. 288.

These Guidelines were revised within a year, and the definition of "actions" was altered slightly to include, in addition to "policymaking," "recommendations or favorable reports relating to legislation including that

complaint before the district court (A. 8-11). This establishes standing. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *United States v. SCRAP*, 412 U.S. 669, 686 n.13 (1973) (SCRAP I); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

for appropriations." 36 Fed. Reg. 7,724, 7,724 (1971). The use of the word "that" rather than "those" shows the intent to include appropriations in the term "legislation."

In August, 1973, the Guidelines were once again revised. "Actions" now were defined to include both "recommendations or favorable reports relating to legislation including requests for appropriations" and "the making, modification, or establishment of . . . policy." 40 C.F.R. § 1500.5(a)(1) (1978), 38 Fed. Reg. 20,550, 20,551 (1973).[18]

[18] The date of proposal of the 1973 guidelines is significant. CEQ's May 2, 1973 proposal came after more than three years of experience with NEPA during which time CEQ's Guidelines dealt specifically and solely with the EIS requirements under Section 102(2)(C). Further, the May 2, 1973 proposal followed five months on the heels of then Judge McCree's unequivocal holding in *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1181 (6th Cir. 1972), that budget requests were proposals for legislation within the terms of NEPA. Moreover, on June 12, 1973, the United States Court of Appeals for the District of Columbia Circuit decided *Scientists' Institute for Public Information, Inc. (SIPI) v. AEC*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) to the same effect. Nevertheless, CEQ retained its definition of actions to include "recommendations . . . relating to legislation including requests for appropriations."

Further, the preamble to the final 1973 Guidelines (August 1, 1973) noted that CEQ had received "numerous comments on its proposed guidelines from environmental groups, *Federal*, State and local *agencies*, industry and private individuals." 38 Fed. Reg. 20,550, 20,550 (1973) (emphasis added). CEQ also stated that, in addition to the theme of increasing the opportunity for public participation in the EIS process, commentators had emphasized the need for "more detailed guidance on the responsibilities of Federal agencies *in light of recent court decisions interpreting NEPA.*" *Id.* (emphasis added).

Thus, it fairly can be assumed that CEQ was well aware of the then recent holdings in *TVA* and *SIPI* at the time of final

The definition of "actions" was altered slightly in both revisions of the Guidelines after extensive public and agency comment, evidencing careful consideration of the scope of the impact statement requirement. Nevertheless, the application of NEPA to requests for appropriations never changed. From 1970 to 1978, CEQ, on three occasions, expressed its consistent opinion that impact statements were required to accompany budget requests.[19]

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promulgation of the 1973 Guidelines. CEQ's Annual Report discussed *SIPI* at some length, characterizing it as "one of the most significant NEPA decisions of the past year." [1973] CEQ Ann. Rep. 241. It also stated that "[t]he revised version incorporates much of NEPA's legal evolution in the courts over the past two years . . ." *Id.* at 234. Nevertheless, those final Guidelines—which remain in force today—retained the provision under discussion here. Under these circumstances, the Court should give great weight to those contemporaneous interpretations by CEQ of NEPA.

[19] Although CEQ during the eight-year period promulgated only non-binding guidelines, most federal agencies promulgated regulations to govern their NEPA compliance. Many agencies explicitly included budget requests among the activities requiring impact statements. For example, the Department of Interior said that actions requiring impact statements included "recommendations or favorable reports to the Congress relating to legislation including appropriations" and that any proposed action with an environmental impact "likely to be highly controversial should be considered to require an environmental statement." 36 Fed. Reg. 19,343, 19,344 (1971) (addition to Department of Interior Manual). These internal regulations are still in effect. The Department of Defense has similar regulations which, in part, require that, "[f]or those budget items which are identified as having a significant effect on the environment, or which are controversial, an environmental impact statement shall be prepared which will accompany the budget request." 32 C.F.R. § 214.6(d)(1)(ii) (1978). These internal regulations are binding on the agencies. *Service v. Dulles*, 354 U.S. 363, 387-89 (1957); *accord, Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276 (1969).

The court of appeals based its holding, in part, on the 1973 CEQ Guidelines. However, in 1977, the President amended the earlier Executive Order to empower and to require CEQ to issue binding regulations which would establish uniform procedures for implementing the procedural provisions of NEPA. Exec. Order 11,991 § 1, 42 Fed. Reg. 26,967 (1977). The new Regulations were promulgated in final form on November 29, 1978, 43 Fed. Reg. 55,978 (1978), with an effective date of July 30, 1979.

Petitioners contend that reliance on the existing Guidelines is unwarranted and assert that, under the new Regulations, budget requests are no longer considered proposals for legislation (Brief for Petitioners at 40). Petitioners refer specifically to the new definition of "legislation," a term previously undefined in the Guidelines, which specifically excludes "requests for appropriations." 43 Fed. Reg. 56,004 (1978) (to be codified in 40 C.F.R. § 1508.17).[20] They suggest that the Regulations "will *ordinarily* be accorded substantial weight by the courts . . . ." (Brief for Petitioners at 43) (emphasis added). While we generally agree, the weight to be given to this one provision containing the new definition must depend on the timing, the circumstances and, ultimately, the validity of its promulgation. This validity is highly questionable here.

The weight which the new Regulations will deserve should not be accorded the provision under scrutiny. CEQ admitted that its new definition of legislation

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[20] Subsequent citations to the new CEQ Regulations will contain the section of the new 40 C.F.R., followed by the page reference in the Federal Register, *e.g.*, § 1505.2, 43 Fed. Reg. 55,692. Citation to comments will be to pages in 43 Fed. Reg. only.

"is the one instance in the regulations where we assert a position opposed to that in the predecessor Guidelines," and recognized the pendency of the instant case. 43 Fed. Reg. 55,989.[21] CEQ explained its complete "flip-flop" on the grounds that, "in its experience . . . preparation of impact statements is ill-suited to the budget preparation process." *Id.* However, the source of CEQ's "experience" with budgetary impact statements is, at best, unclear, since CEQ reported that no impact statements have ever accompanied requests for appropriations legislation. *Id.* Moreover, CEQ cited no newly-discovered legislative history to justify this complete aboutface. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 145 (1976). Rather, it shunted aside the duty to consider environmental factors which NEPA mandates for agencies—an approach to the interpretation of NEPA which has been expressly rejected by the Court. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787 (1976).[22]

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[21] In the proposed regulations, issued less than a month after the court of appeals' decision, CEQ also cited the instant case, stating that "in consultation with OMB [it] had been prepared to propose this [new] wording." 43 Fed. Reg. 25,245 n.1.

[22] CEQ also based its new interpretation of NEPA's mandate upon "traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors . . ." 43 Fed. Reg. 55,989. This justification goes wholly unexplained. Since the new regulations offer the widest latitude regarding the timing and form of EISs (Part 1502, 43 Fed. Reg. 55,994 *et seq.*) the classification of confidential data (§ 1507.3(c), 43 Fed. Reg. 56,003) and the method of preparing legislative impact statements (§ 1506.8, 43 Fed. Reg. 56,001-02), the "explanation" offered by CEQ provides an inadequate basis for the dramatic shift in policy.

Petitioners' reliance on cases demonstrating "new developments" is unfounded (Brief for Petitioners at 44). None were articulated by CEQ, and it can fairly be assumed that there were none. The only new circumstance to arise since 1973 that would explain CEQ's abrupt reversal on the provision defining legislation is respondents' success in the instant suit. Little, if any, weight should be given a statutory construction motivated by such considerations.[23] Any interpretation

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[23] When CEQ proposed the new Regulations, it requested *public comment* on them. Respondents inspected the comments submitted to CEQ and were able to find only two, besides their own, that dealt with the new definition of "legislation." Both of these opposed the CEQ interpretation. Comments of the Attorney General of the State of New York, August 11, 1978, at 14; Comments of the Environmental Defense Fund, August 8, 1978, at 8. Respondents informally requested access to agency comments on the new proposed definition, but were denied such access.

Respondents then sent requests for the same information under the Freedom of Information Act, 5 U.S.C. § 552 (1976), to several agencies. CEQ denied access to agency comments on the new proposed definition, citing the "inter-agency memorandum exception" to FOIA. 5 U.S.C. § 552(b)(5); letter from Robert B. Nicholas to James H. Cohen, March 13, 1979. OMB denied access to its comments submitted to CEQ on similar grounds. Letter of Velma N. Baldwin to James H. Cohen, March 9, 1979.

However, the inter-agency memorandum exception was obviously unpersuasive to both the Department of the Interior (DOI) and the Department of Agriculture (DOA). They granted respondents complete access to all of their comments on the new Regulations, including those relating to the definition of "legislation." Letter of Bruce Blanchard to James H. Cohen, March 15, 1979 (DOI) (comments generally favorable to new CEQ Regulations, as might have been expected from this petitioner); letter of Glen H. Loomis to James H. Cohen, March 13, 1979 (DOA) (no discussion of new definition of "legislation"). One can only speculate why CEQ and OMB denied respondents' request, when DOI and DOA were willing to honor it. It serves no useful purpose here to articulate the

of Section 102(2)(C) other than that in the Guidelines—which should be given great weight—must be derived from direct examination of the Section's language.

The Court has always shown deference to the interpretation of an act by the agency charged with such interpretation, but it has given special weight to interpretations which are *contemporaneous* to the enactment of the governing statute. *Udall v. Tallman,* 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933). This is particularly true where a more recent interpretation (here, the CEQ regulation promulgated more than eight years after the enactment of NEPA) sharply conflicts with a consistent pattern of contemporaneous interpretations of the same statutory provision, which were thoroughly considered before their issuance and reissuance. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).[24] The validity of CEQ's Regulations relating to budget requests has not been tested in court, whereas the essential correctness of the pertinent provisions in the Guidelines has been repeatedly affirmed.

Recently, the Court was unwilling to give effect to a 1972 agency guideline when it conflicted with earlier pronouncements of that agency and contained no suggestion that some new source of legislative history has been unearthed to justify the more recent, but sharply conflicting, interpretation. *General Electric Co. v. Gilbert,* 429 U.S. 125, 142-145 (1976). *Gilbert* is relevant to the instant case. There, as here, the later agency pronouncement was not a contemporaneous interpretation of a statute. There, as here, the later pronouncement flatly contradicted contemporaneous constructions of over nearly a decade. *Id.* at 142-143. Therefore, the new CEQ regulation defining "legislation" deserves little deference, in view of prior guidelines and the circumstances surrounding its issuance.

legal basis for our position that such documents are not exempt under FOIA. In the words of Senator Muskie, a principal proponent of NEPA, "regulations can be influenced without accountability, without minutes, without a record." *Washington Post,* Feb. 28, 1979 at A2, Col. 2.

[24] The consistent interpretations were made entirely within the period during which CEQ was responsible for issuing guidelines on only one provision of NEPA, Section 102(2)(C), while its new Regulations address all nine subdivisions of Section 102(2).

b. "Legislation" includes appropriations.

Petitioners contend that there is no indication that Congress used the word "legislation" "loosely" in Section 102(2)(C) to include appropriations (Brief for Petitioners at 37). As proof of this fact, petitioners point to certain procedural rules of the House and Senate which supposedly prove that Congress, in using the word "legislation" in substantive enactments, never means to include appropriations.

The question before the Court is not whether Congress may, for reasons related to the legislative decision-making process, distinguish between legislation and appropriations in its administrative rules. The issue is how Congress used the word "legislation" in Section 102(2)(C). As Judge McCree stated in *Environmental Defense Fund v. TVA,* 468 F.2d 1164, 1181 (6th Cir. 1972):

> Appellants claim . . . that there is a distinction between 'legislation' and annual appropriations for purposes of construing section 102(2)(C). They urge that the former refers to a change in

> existing law but the latter constitutes merely a routine authorization to disburse funds[,] . . . that the standing rules of both the House of Representatives and the Senate embody this distinction and that it can be assumed that Congress was aware of the distinction when it approved the use of the word 'legislation' in section 102(2)(C). . . .
>
> We find this contention unconvincing . . . . More significantly, the Congress may have valid reasons for distinguishing between 'legislation' and 'appropriations' for purposes of determining procedural matters such as deciding the proper committee to which to refer a bill or the time or duration of legislative debate. But that does not require us to close our eyes to the commonly accepted meaning of the word 'legislation'—the making or giving of laws—or to the clearly expressed congressional purpose of NEPA.

In construing a definite procedural provision such as Section 102(2)(C), courts have been admonished to stick closely to the text and not to import argumentative qualifications from broad, unexpressed claims of policy. *Utah Junk Co. v. Porter,* 328 U.S. 39, 44 (1946). In common parlance, the word "legislation" is not a term of art, but a description of the statutory output of legislative bodies such as Congress. *See Environmental Defense Fund v. TVA, supra,* 468 F.2d at 1181. This would include budget requests for appropriations legislation. While the legislative history of NEPA does not reflect consideration of any definition of the word "legislation," the one reference to the legislative proposal provision does at least suggest that requests for appropriations legislation were intended to be embraced within the broad category of "legislation." [25]

[25] *See* note 9, *supra.*

Further, Congress has been apprised of the holding of the district court in this case which required EISs to accompany budget requests, and has taken no action to amend NEPA. *See National Environmental Policy Act Oversight: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment,* 94th Cong., 1st Sess. 170, 175-79 (1975) (statement of Bruce J. Terris) (witness described implications of Judge Pratt's decision in the instant case). Any intent by Congress to exclude such a major and commonly accepted function of the legislative process from the strong mandate of NEPA, which twice has been before Congress for amendment, would have been clearly stated. The general counsels of federal agencies have apparently read NEPA as respondents do. The interpretation of "legislation" urged by respondents here is one adopted by numerous agencies in their regulations governing NEPA compliance. *See, e.g.,* 36 Fed. Reg. 19,343, 19,344 (1971) (addition to Department of Interior Manual) (still in effect). *See* note 19, *supra.*

If there is doubt about the meaning of this statutory term, the Court should construe "legislation" in the manner suggested by respondents, since it gives effect to the intent of Congress in passing NEPA. *Environmental Defense Fund v. TVA,* 468 F.2d 1164, 1176 (6th Cir. 1972); *Saxon v. Georgia Association of Independent Insurance Agents,* 399 F.2d 1010, 1015 (5th Cir. 1968).[26]

[26] If Congress had intended to exclude requests for appropriations legislation from Section 102(2)(C), it would have used explicit language similar to that in the new CEQ Regulations. *See* text accompanying note 20, *supra.* Indeed, the need perceived by CEQ to define "legislation" in its Regulations so as expressly to exclude appropriations indicates its implicit recognition that "legis-

The Court has recently considered the relationship of the word "legislation" to the word "appropriation." The Court said that "substantive enactments" and "appropriations measures" are "acts of Congress," but appropriations measures have a more limited and specific purpose. *TVA v. Hill,* 437 U.S. 153, 190 (1978). In *Hill,* the Court referred to "the legislative proceedings leading to the 1977 appropriations." *Id.* The product of legislative proceedings is, necessarily, "legislation."

The Court in *Hill* twice made a well-recognized distinction between appropriations and "substantive legislation." *Id.* The use by the Court of the adjective "substantive" to modify "legislation" is crucial. If legislation and appropriations were mutually exclusive terms, there would be no need to identify legislation as "substantive" in order to distinguish it from appropriations. In reality, "substantive legislation" means authorizations. As the Court noted, Congressmen need to know that, in voting on appropriations, they will not be affecting previous authorizations; otherwise they would be required "to review exhaustively the background of every *authorization* before voting on an *appropriation.*" *Id.* (emphasis added). Although this Court was not construing the term "legislation" in *Hill,* it is clear from the use of the term by the Court that the Court understood it to include appropriations. It is only logical that all actions by the "legislative branch" affecting the allocation of rights and resources would be called "legislation."

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lation" commonly includes appropriations. Congress could, of course, amend NEPA expressly to exclude requests for appropriations legislation from the meaning of "legislation."

The limits of the term "legislation" recently were tested in *Realty Income Trust v. Eckerd,* 564 F.2d 447 (D.C. Cir. 1977). There the court was faced with the question of whether the General Services Administration had to prepare an EIS at the time it presented a prospectus to congressional committees on construction of a proposed federal building. *Id.* at 450. If both the House and the Senate Committees approved the prospectus, the building would be constructed, but if either Committee disapproved, the project would be killed. *Id.* The court, in holding submission of the prospectus to be a "proposal for legislation," asserted that whatever the status of committee action in parliamentary terms, its role, in the scheme of the statute requiring it, "fully implicates NEPA's concerns and goals." *Id.* at 453. If action by a single committee in approving a prospectus can be "legislation," the action by the full Congress in approving an appropriation is certainly legislation.

Petitioners refer to procedural rules of the House and Senate to support their narrow definition of "legislation" (Brief for Petitioners at 34-35). Internal housekeeping rules are weak authority for giving meaning to a term in a substantive enactment. The rules cited, when viewed in the context of the legislative history of NEPA, are unpersuasive authority.

The rules of the House of Representatives should not be given any weight, since the House did not consider a bill containing Section 102(2)(C) until after the Conference Committee added the Senate-passed EIS provisions to the final bill. *See* H.R. Rep. No. 765, 91st Cong., 1st Sess. 8 (1969) (Conference Report). The impact statement requirement was a creation of the Senate.

Petitioners cite only one Senate Rule to support their interpretation of NEPA, Rule 16.4 (Brief for Petitioners at 34). This Rule prohibits amendments which propose "general legislation" from being considered during debate on appropriations bills. The use of "general" to modify "legislation" is as crucial as the use of the modifier "substantive" was in *Hill*. In both situations the word "legislation" is modified in order to distinguish it from "appropriations." This would not be necessary if the terms were mutually exclusive. However, they obviously are not.

Thus, petitioners are forced to defend a strained interpretation of "legislation" in order to prevail. It is more reasonable to conclude that Congress did not intend to exclude proposals for appropriations from "proposals for legislation" which require impact statements. *See* Comment, *Sierra Club Seeks to Require NEPA Impact Statements on Annual Appropriations Proposal*, 5 ELR 10,071, 10,072 (1975).

c. "Major Federal actions" include appropriations.

Even if the Court holds that appropriations are not properly characterized as "legislation," they are certainly "major Federal actions."[27] An appropriation

[27] Petitioners have mistakenly understood respondents to be claiming that Section 102(2)(C) should be read disjunctively as applicable to "proposals for legislation" on the one hand and to "other major Federal actions" on the other (Brief for Petitioners at 45, n.34). While this may have been the opinion of the district court (Pet. App. 51a), respondents make no similar contention. In our brief before the court of appeals, we argued that "annual appropriations proposals" are "*proposals* for major Federal action" (Brief for Appellees at 25) (emphasis added). We also stated that petitioners cited no cases to show that the "proposals" advanced by DOI's budget requests were not "proposals for

for a federal agency, which follows a "painstaking review of an ongoing program" (Pet. App. 17a), and, then, a request for budget approval to take an action significantly changing the status quo, *id.*, is a "major Federal action."[28] A programmatic change effected by such an appropriation is exactly the kind of appropriation to which Congress intended the impact statement requirement to apply. The budget's implementation entails policy decisions, expenditures and resource commitments of such significance (and, often, of such controversy) as to qualify the appropriations as "major Federal action" under the terms of NEPA.

The legislative history of NEPA makes clear that major changes in an agency's program or an agency's policy subsequent to intensive review of a program are

'major Federal actions.'" (*Id.* at 27). By equating proposals for appropriations with proposals for major Federal action, we implied that appropriations are "major Federal actions."

[28] Respondents use the term "ongoing program" to describe a program for which an authorization is already in force. Thus, if an agency proposed an entirely new program to Congress that would have a significant effect on the environment, an EIS would be required since the proposal for the program's authorization would be a "proposal for legislation." If a program were authorized in one year, but no appropriation were proposed until the next year, the appropriation would be for an "ongoing program," that is, a program already authorized. If the proposal for appropriations ushered in a considered programmatic course following a programmatic review, respondents maintain that it should be accompanied by an impact statement. The legislative history of NEPA indicates that every agency proposal involving the "revision of ongoing programs" would involve consideration of potential environmental consequences and, if necessary, the preparation of an EIS. *See* note 9, *supra*.

"major Federal actions." The Senate Report states that impact statements are required for "major actions, such as *project proposals,* proposals for new legislation, regulations, *policy statements,* or *expansion or revision of ongoing programs.*" S. Rep. No. 296, 91st Cong., 1st Sess. 20 (1969) (emphasis added). *See also Scientists' Institute for Public Information, Inc. (SIPI) v. AEC,* 481 F.2d 1079, 1088 (D.C. Cir. 1973).

Petitioners have not argued that the CEQ regulations, if applied to the budget process, would be incompatible with NEPA. In fact, CEQ's Regulations do not exclude requests for appropriations legislation from the definition of "major Federal action." § 1508.18, 43 Fed. Reg. 56,004. CEQ now defines "major Federal actions" to include "actions with effects that *may* be major and which are *potentially* subject to Federal control and responsibility," *id.* (emphasis added), including new and continuing programs, *id.* at 56,005, and systematic and connected agency decisions allocating agency resources to implement a specific statutory program, *id.* Appropriations for agencies are *clearly* subject to federal control and responsibility; and, in the context of the instant case, relate to allocations of agency resources resulting from systematic and connected agency decisions.

Projects of a localized nature have frequently been characterized as "major Federal actions."[29] If such

[29] *See, e.g., Scherr v. Volpe,* 466 F.2d 1027, 1033 (7th Cir. 1972) (conversion of 12 mile length of highway from two lanes to four lanes was "major Federal action"); *Lee v. Resor,* 348 F.Supp. 389, 396 (M.D. Fla. 1972) (spraying of hyacinths on St. Johns River in Florida with pesticide by Corps of Engineers was "major Federal action").

localized projects qualify for coverage under Section 102(2)(C), then appropriations of potentially nationwide scope should similarly qualify. Petitioners reason erroneously that, while budget requests relating to "discrete federal projects" may have been held to require impact statements, those decisions would not apply to an agency's general budget proposal for an entire program or activity (Brief for Petitioners at 23 n.16). On the contrary, if discrete projects are "major Federal actions," then expenditures with nationwide implications are certainly "major Federal actions." Moreover, the court of appeals' decision can fairly be characterized as limited in scope to ongoing discrete federal programs and activities involving specific and definable choices for the commitment of federal resources.[30]

In sum, an agency's considered request for appropriations legislation falls within the purview of NEPA. As either legislation or major Federal action, an appropriation fits within the terms of Section 102(2)(C).

2. An Agency's Budget Request May Be a Proposal for Legislation or a Proposal for Major Federal Action.

As a full disclosure law, NEPA makes federal decision-making more responsive and more responsible,

[30] The court of appeals did not feel it necessary to consider whether an appropriation could be a "major Federal action," since it held that an appropriation is properly regarded as legislation (Pet. App. 17a). The district court did hold that budget requests are "major Federal actions" (Pet. App. 51a). Furthermore, Judge MacKinnon, in dissent, said that a budget request made for the first time and initiating a new program, or cutting off funds to an existing program, might be "major" (Pet. App. 42a). If the Court agrees with petitioners that an "appropriation" is not "legislation," this independent basis for coverage under Section 102(2)(C) would have to be examined.

while advising the public of the environmental consequences of proposed activities. In drafting NEPA, Congress realized it would ill serve the policy and objectives of the Act if impact statements were required only to *accompany* enacted legislation or the implementation of other major Federal actions, rather than to precede such final actions. For one, Congress was not required to prepare impact statements. Therefore, an EIS would never be prepared for a bill. As for other major Federal actions, if no impact statements were prepared until the actions took place, the statements and their environmental reviews would amount to *post-hoc* rationalizations which Congress wished to avoid. To this end, Congress required that agencies include impact statements in "every recommendation or report on *proposals* for legislation and other major Federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added). By pushing the EIS requirement back to the early planning stages of a proposal—before legislation has been passed or action has been taken—Congress intended to insure that environmental effects would be considered early enough to be a factor in the decision-making process; and that there would be adequate opportunities to modify a project or program after a proposal had been made.

Petitioners contend that, even if an appropriation is "legislation," there is no "proposal for legislation" until the President submits his budget to Congress (Brief for Petitioners at 29-31). Supposedly, the agency's budget request to Congress is not sufficiently final to constitute a proposal, since the President may always alter or, theoretically, even deny the agency's request *in toto* (*id.* at 30). Petitioners' argument reflects a fundamental confusion between proposals "for"

legislation or major Federal action and proposals "to" certain individuals. NEPA does not by its terms limit applicability of the EIS requirement to proposals going to certain recipients. It applies to *every* recommendation or report on proposals *for* certain activities. 42 U.S.C. § 4332(2)(C).

Section 102(2)(C) requires all federal agencies to prepare an EIS on every proposal whether or not it technically represents a final proposal of the Executive Branch. Any proposal for legislation or other federal action which would significantly affect the environment must be accompanied by an EIS, irrespective of the entity to which it is forwarded or which may make a determination on it. As the court of appeals noted in rejecting petitioners' contention that requests for budget approval and appropriations are not "proposals:"

> Certainly the fact that a proposal is subject to further review by the Executive is no bar to NEPA's requirement for an environmental statement. On the contrary, NEPA calls for an EIS precisely so that environmental consequences may be taken into account before a final decision is reached by the executive official or agency.

(Pet. App. 22a.)

If agency budget proposals are not "proposal[s]" for legislation or other major Federal action under Section 102(2)(C) because they do not constitute the Executive branch's final submission to Congress, then any agency proposal for environmentally-significant legislation would be exempt from NEPA whenever it required a submission to Congress after legislative clearance through OMB. However, there is nothing in

NEPA or its legislative history to indicate that Congress, after specifically providing that all such proposals were to be covered, intended such a broad exemption from the requirements of Section 102(2)(C). Such an argument contravenes the entire thrust of NEPA which is to ensure that *all* federal decisionmakers—including the President and Congress—consider the environmental effects of their decisions before they become final. *City of Boston v. Volpe,* 464 F.2d 254 (1st Cir. 1972). This is best accomplished when they have the benefit of the agency's own assessments and evaluations. *NRDC v. Morton,* 458 F.2d 827, 833 & nn.11,12 (D.C.Cir. 1972), *cited with approval in Vermont Yankee Nuclear Power v. NRDC,* 435 U.S. 519, 534 (1978); *Jones v. District of Columbia Redevelopment Land Agency,* 499 F.2d 502, 510-11 (D.C.Cir. 1974), *cert. denied,* 423 U.S. 937 (1975).

The CEQ Regulations specifically require that, in determining whether a proposal for legislation is a "proposal" under Section 102(2)(C), the controlling factor is not the entity which ultimately forwards the proposal to Congress, but the role of the federal agencies in developing it. § 1508.17, 43 Fed. Reg. 56,004. If a proposal is developed by or with the significant cooperation and support of a federal agency, it is a "proposal for legislation" under Section 102(2)(C), regardless of the entity which transmits it to Congress. *Id.*[31]

[31] The CEQ Regulations and Guidelines on NEPA have consistently recognized that an agency's proposal for legislation or other major Federal action is a "proposal" under Section 102(2)(C) even though a final decision on it is to be made by another agency. *See* § 1501.5, 43 Fed. Reg. 55,992; 40 C.F.R. § 1500.7(b) (1978).

Petitioners' contention that an agency's budget request may never constitute a "proposal for legislation" lacks support under NEPA and is based on a misrepresentation of the way in which the budget process actually works. In reality, agency budget requests are the result of many months of intensive consideration and preparation and they rarely undergo more than superficial alterations by the President before he transmits his combined federal budget to Congress.[32]

At the time the final agency budget request is forwarded to OMB for eventual, formal transmission by the President, it has reached a stage of definiteness which, from the agency standpoint, has established the agency's clear intention to take steps and commit resources which may result in significant environmental effects. *See Environmental Defense Fund v. TVA, supra,* 468 F.2d at 1177. No further action by the agency is required after the submission of its request for budget approval and appropriations. This request is in a form which Congress may use without further reference to the agency. *Realty Income Trust v. Eckerd,* 564 F.2d 447, 453 (D.C.Cir. 1977). Under these circumstances, the budget request is a "proposal" under NEPA.

Petitioners would place agency budget requests into the category of "predecisional document[s]," but the description is neither applicable nor relevant (Brief for Petitioners at 50). In *Kleppe v. Sierra Club,* 427 U.S. 390 (1976), the Court held that an impact statement was not required on a regional coal development plan, because there had been no proposals for action of

[32] *See* discussion, *supra,* at 21-22.

a regional, as opposed to a local or national nature. *Id.* at 399, 400. The Court held that the court of appeals had erred by ignoring the requirement of Section 102(2)(C) that there be a proposal and by devising a "balancing test" to determine the point during the germination process of a "potential proposal" when an impact statement would be required. *Id.* at 406. The Court found that there was no major Federal action, since federal officials were not even contemplating a regional development plan or program. *Id.* at 403.

An agency's budget proposal stands in a different position than the nebulous and uncertain regional program in *Kleppe*. As petitioners' brief indicates, every agency is absolutely certain that there will be an annual congressional appropriation for the agency (Brief for Petitioners at 8-11). An agency knows that it will have to prepare annually a final request for a specific level of appropriations, since agencies are statutorily required to prepare budget requests. *See* 31 U.S.C. § 23. Given the statutory mandate for preparation and submission of a budget, creation of a *legislative* proposal is a certainty. "In such a situation, the court's concern, implicit in *Kleppe*, that an EIS which precedes a proposal would necessarily be unfocused and potentially useless, 427 U.S. at 402, would be unfounded." Note, *supra* note 7, at 590 n.158. While the precise dollar figures may differ from the agency proposal to the President's transmission, the fact is that the agency's policy judgments and program commitments have been finally determined and are reflected in its recommendation for budget approval and appropriations.

The final budget request of an agency is not mere speculation on what might be. It is a solid proposal based on the agency's considered decisions of what

should be. An EIS on the ramifications of actions implementing the agency's proposal, under NEPA and consonant with principles of good management, should accompany the proposal to Congress.

Petitioners imply that there can be no "proposal" until every contingency blocking the path to ultimate realization of the proposal is removed. However, the use of the word "proposal" implies future action. A proposal, while reflecting many decisions already made, is inherently predecisional. The language of Section 102(2)(C) describing the impact statement itself makes it clear that proposals requiring impact statements will be faced with contingencies. Section 102(2)(C) requires the statement to discuss any environmental effects which cannot be avoided "should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii). Similarly, the statement must describe any irreversible and irretrievable commitments of resources "which would be involved in the proposed action should it be implemented." *Id.* § 4332(2)(C)(v). An agency could easily discuss anticipated effects of its own proposal, even if the proposal might later be altered by the President. Indeed, the significance of such an alteration would be clarified by the agency's impact statement. If no agency proposal existed until complete implementation of the proposal were assured, then even the President's submission of the combined federal budget would not constitute a "proposal," since the request for approval might be altered by a congressional appropriations committee.

Many courts have refused to adopt petitioners' contention that no proposal exists where there is the pos-

sibility of review.[33] One recent case vividly illustrates the weakness of petitioners' argument. In *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502 (D.C.Cir. 1974), *cert. denied*, 423 U.S. 937 (1975), plaintiffs challenged the failure of defendants District of Columbia Redevelopment Land Agency (RLA), National Capitol Planning Commission (NCPC), and the U.S. Department of Housing and Urban Development (HUD) to comply with Section 102(2)(C) in formulating and executing urban redevelopment plans. The decision-making process for the redevelopment plans in question required (1) RLA's submission of a proposed program to NCPC for adoption or modification; (2) if NCPC approved the proposal, the submission of the plan to the District of Columbia City Council for a decision whether to empower RLA to submit the proposal to HUD; and finally (3) a HUD decision on whether or not to fund the proposal.

The court of appeals considered whether Section 102(2)(C) required RLA to prepare an EIS to accom-

[33] *See, e.g., Environmental Defense Fund v. Adams*, 434 F. Supp. 403 (D.D.C. 1977). In *Adams*, the court applied *Kleppe* to the required revision by the Secretary of Transportation of the National Airport System Plan, a plan which aids the Secretary in deciding which airport-related projects are approved. *Id.* at 404. The Secretary argued that "so many contingencies stand in the way of the Plan's ever being fully realized that it cannot fairly be said to contain a 'proposal.'" *Id.* at 407. But the court held that the revisions were a "proposal," because the revised Plan would "have all the earmarks of a goal towards which the Secretary is to devote his efforts." *Id.* Similarly, an agency's budget request represents a goal towards which the agency head will devote his/her efforts; witness the ability of the agency head to appeal any revisions in his/her request directly to the President (Brief for Petitioners at 10). Applying the language of *Kleppe* (427 U.S. at 402), the court in *Adams* asserted that a "proposal" would have limits which are clear enough to allow an official meaningfully to address the questions posed in Section 102(2)(C). 434 F. Supp. at 406. The intricacy of agency budget justification statements proves that agency requests are sufficiently well-defined to permit meaningful analysis. *See also Realty Income Trust v. Eckerd*, 564 F.2d 447, 455 (D.C. Cir. 1977) (prospectus on construction of a new federal building is a "proposal" under NEPA even though the specific site and method of financing have not yet been selected); *Environmental Action Foundation v. Brown*, 7 ELR 20,372, 20,373 (D.D.C. 1977) ("[I]n any major Federal program designed to be completed over a period of years, subsequent legislative or executive decisions could result in curtailment or abandonment of the plan").

Petitioners' reliance on *Aberdeen & Rockfish Railroad v. SCRAP*, 422 U.S. 289 (1975) (SCRAP II), is unfounded. The case involved a nonfinal and limited decision by the ICC in a general revenue proceeding regarding a proposed percentage increase in rail rates. The ICC had given consideration to certain environmental factors in the general revenue proceeding and, thereafter, had prepared an EIS, despite the interim nature of the proceeding. The revenue proceeding did not, however, involve any specific challenge to rates on individual commodities or categories thereof; just a general inquiry as to whether a genuine financial crisis existed which would have warranted an increase. The issue under consideration—entitlement of the railroads to some kind of general rate increase—raised few environmental issues and none which had been claimed to have been inadequately considered in the impact statement prepared by the ICC. Although the Court indicated that certain environmental issues had been reviewed in the general revenue proceeding, it noted that the Commission had wide discretion in deciding which issues to address. The underlying rate structure was one issue which the Commission had decided to investigate separately from the general revenue proceeding. Careful attention to the environmental issues which specifically related to the rate structure had been postponed by the ICC for that investigation. Such issues were not appropriate for review. Under these circumstances, the court held that the ICC had taken no federal action regarding the underlying rate structure which was being challenged. Moreover, the court distinguished between notions of "finality" under NEPA and under the Administrative Procedure Act; pointing out that agency consideration of environmental effects may be complete (and subject to review) even though other aspects of federal action are not. *Id.* at 319.

pany its proposal to NCPC. The court concluded that RLA's submission was itself "a proposal for federal action requiring an environmental impact statement." 499 F.2d at 510. The court reasoned as follows:

> The federal defendants argue, however, that to require RLA to submit an environmental impact statement to NCPC together with its action year plan would be inefficient, since NCPC may well modify the plan and thus render RLA's impact statement an anachronism. But, in our view, this argument proves too much. Indeed, it radically misconceives the purposes of the impact statement requirement . . . .
>
> Thus, it is precisely because NCPC has the power to modify RLA's action year proposals that impact statements accompanying the proposals are necessary. NCPC's decision on whether to approve the proposals as presented or to modify them may be, and should be, *vitally affected by the information contained and the conclusions drawn in RLA's impact statements.* Equally important, perhaps, the public will be afforded an opportunity prior to NCPC's decision, to inform it of data and views contrary to those submitted by RLA, thus ensuring that NCPC's own environmental impact statement will be premised on the fullest possible canvassing of environmental issues, and that environmental factors will be taken into account before the action year plans take on the perhaps irreversible momentum of NCPC approval.

499 F.2d at 510-11 (emphasis added).

Under the new CEQ Regulations, a "proposal" exists "at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." § 1508.23, 43

Fed. Reg. 56,005. As respondents have pointed out, by the end of September an agency has made definite and final decisions regarding its funding priorities and allocations for the forthcoming year. When an agency submits its annual budget request to Congress through OMB it already will have considered alternative actions necessary to accomplish its stated goals. Therefore, an agency's annual budget request has reached a stage well beyond that of active preparation for a decision. At very least, it is a "proposal" under the Regulations which can be "meaningfully evaluated." NEPA's action-forcing mandate, therefore, can be properly integrated with agency planning, with beneficial results for every stage of budget management. As important, the President and Congress will have a clear understanding of the environmental consequences which may be triggered by congressional action on the request. Notably, the CEQ Regulations do not require the agency to be guaranteed successful accomplishment of its goals. Such a guarantee would be impossible to require of any proposal.

In sum, by enacting NEPA, Congress has chosen to infuse environmental considerations into the agency decision-making process at a point where choices have been crystallized and alternatives weighed—before irrevocable decisions have been made and resources committed. Under those terms, a budget request is a proposal. The CEQ Regulations,[34] case law and the language of NEPA itself indicate that an agency's budget request is sufficiently final and definite to constitute a "proposal," within the meaning of Section 102(2)(C).

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[34] *See* text accompanying note 31, *supra*.

B. Previous Judicial Decisions Support Application of the Procedural Requirements of NEPA to the Budget Process.

Petitioners claim that the holding of the court of appeals "marks the first significant judicial intervention" in the Executive budget process (Brief for Petitioners at 23).[35] The court of appeals did not "intervene" in the Executive budget process. It simply construed the pronouncements of Congress contained in NEPA as they applied to the budget process.

The issue of the application of NEPA to the budget process is one of first impression for the Court, but there is no lack of judicial precedent to support respondents' contentions. Every court which has treated the issue prior to this Court has held that agency budget requests are proposals for legislation or proposals for other major Federal action.

The most thorough judicial examination of the relationship between NEPA and the budget process was Judge McCree's decision in *Environmental Defense Fund v. TVA,* 468 F.2d 1164 (6th Cir. 1972). *TVA*

[35] Petitioners also claim that, according to their research, only two other decisions have applied NEPA to the budget process (Brief for Petitioners at 23, n.16). In fact, there are more decisions, as respondents point out in the text. Petitioners cite two cases to demonstrate judicial refusal to impose procedural conditions or reporting or disclosure requirements on the budget-making process (*id.*). These cases are not on point. In *Sierra Club v. Department of Interior,* 424 F. Supp. 172, 175 (N.D. Cal. 1976), the court essentially refused to require Congress to appropriate certain funds, while in *National Wildlife Fed'n v. United States,* 8 ELR 20,651, 20,652 (D.D.C. 1978), *app. pending,* No. 78-1976 (D.C. Cir.), the court simply refused to impose certain reporting requirements on the President. While NEPA may impose no procedural requirements on either Congress or the President, it is the legal requirements of federal agencies which are at issue in the instant case.

tested the applicability of NEPA to an ongoing project which was initiated and substantially completed prior to the enactment of NEPA. *Id.* at 1172. The court upheld the application of NEPA to the project on alternative grounds, one of which was that the annual appropriations request by TVA for the project was a "proposal for legislation" requiring preparation of an impact statement. *Id.* at 1181. The court relied on the CEQ Guidelines and the plain meaning of the word "legislation." *Id.* The court was not persuaded by the Government's claim that preparation of impact statements in connection with budget requests would place an enormous administrative burden on federal agencies. *Id.* at 1182. In so holding, the court of appeals was affirming a conclusion independently arrived at by the district court. *Id.* Judge McCree's opinion fully addressed the issue in the instant case, and squarely supported respondents' contentions.

While no court prior to the instant case has examined the question as carefully as Judge McCree, other courts have recognized the applicability of NEPA to the budget process. Referring to the Liquid Metal Fast Breeder Reactor program, the D.C. Circuit noted in 1973 that "[t]he program comes before the Congress as a 'proposal for legislation' each year, in the form of appropriation requests by the (Atomic Energy) Commission." *Scientists' Institute for Public Information, Inc. (SIPI) v. AEC,* 481 F.2d 1079, 1088 (D.C. Cir. 1973). While the D.C. Circuit held the appropriations request to be a "proposal for legislation," another court found that a dam and reservoir project was a "major Federal action," and that NEPA is applicable to all federal action, "including proposals for appropriations." ***Environmental Defense Fund v. Froehlke,***

348 F.Supp. 338, 364 (W.D.Mo. 1972), *aff'd,* 477 F.2d 1033 (8th Cir. 1973). Still another court has held that NEPA was violated when an EIS was not filed at the time of a request for supplementary appropriation by the Corps of Engineers on a dumping operation. *Save Our Sound Fisheries Ass'n v. Callaway,* 387 F.Supp. 292, 309 (D.R.I. 1974). Finally, one other court has rejected the argument that there is no "proposal for legislation" until the President submits his budget to Congress. *Aluli v. Brown,* 437 F.Supp. 602, 607 (D. Haw. 1977), *appeal pending.*[36]

The one-sidedness of judicial interpretations of Section 102(2)(C) as applied to the budget process demonstrates that courts have applied the plain language of Section 102(2)(C) in a manner consistent with congressional intent. Agency consideration and articulation of environmental effects, as well as meaningful participation by the public in decisionmaking, both at the administrative and legislative levels, would otherwise be stymied. Petitioners' interpretation, on the other hand, would require this court to adopt a strained and unsupported holding that would fly in the face of the legislative will. Petitioners would have the Court ignore some words in Section 102(2)(C), add others, and misinterpret the rest. In short, petitioners seek to escape their clear statutory obligations—duties which have been underscored by several courts.

[36] Petitioners try to distinguish these cases on the basis that each involved requests for discrete projects rather than a request involving an entire program (Brief for Petitioners at 23, n.16). This distinction is unrelated to the issue of whether "legislation" includes appropriations. Furthermore, the application of NEPA to discrete projects suggests equal, if not stronger, application to large national programs which, if implemented, may produce extensive environmental consequences.

C. Preparation of Impact Statements in Connection With Certain Budget Requests Would Not Impose Any Significant Additional Burden on the Federal Agencies.

Compliance with the procedural requirements of NEPA has never been held to depend on considerations of administrative difficulty, delay or economic cost. *See Environmental Defense Fund v. TVA,* 468 F.2d 1164, 1176 (6th Cir. 1972). "[P]reparation and circulation of an impact statement is crucial to proper evaluation of environmental factors" and, therefore, strict compliance with Section 102(2)(C) is required. *Id.* In the absence of an existing law applicable to the agency's operations which "expressly prohibits or makes full compliance impossible," each agency *must* comply fully with the purposes and provisions of the Act. 115 Cong. Rec. 39,703 (1969) (House Conferees); *id.* at 40,417-18 (Senate Conferees); CEQ Regulations, § 1500.6, 43 Fed. Reg. 55,992. Strict adherence to NEPA's procedural requirements, however, has never been held to place a "straitjacket" upon the agencies, *SIPI v. AEC,* 481 F.2d 1079, 1092 (D.C. Cir. 1973), nor to impose an impossible standard of compliance, *Environmental Defense Fund v. Corps of Engineers,* 492 F.2d 1123, 1131 (5th Cir. 1974).

Nevertheless, petitioners argue that NEPA should not be applied to the budget process because of time pressures and other uncertainties (Brief for Petitioners at 46-47, 55). Petitioners fail to demonstrate that adherence to the holding of the court of appeals would be impossible, either practically or because of a conflict with any particular statute. Petitioners overstate the administrative burden that full compliance with NEPA would place on the budget process.

The court of appeals adopted a principle limiting the applicability of NEPA to the budget process. The court

held that if there was no proposal to change the status quo, there was no duty to prepare an impact statement (Pet. App. 15a). However, "NEPA may have application to those budget requests that follow or accompany an agency's painstaking review of an ongoing program" (Pet. App. 17a). The court called this painstaking review a "new look," but declined to hold when such a review of an ongoing program is required (Pet. App. 17a-18a).

Agencies have wide discretion in determining whether there will be a considered review of their ongoing programs (Pet. App. 18a).[37] In the instant case, the court found that, after this suit had been filed, the Fish and Wildlife Service had undertaken a programmatic review of the National Wildlife Refuge System for a ten-year period at the 1974 level of funding, and had prepared a programmatic EIS on the review. The court held that this broad EIS had obviated the need for a separate impact statement to cover the specific budget request (*id.*). The implication is that if a programmatic review precedes or accompanies a budget request, an EIS will have to be prepared, because the request would be a "proposal for legislation" and/or a "proposal for major Federal action."

Under the limiting principle of the court of appeals, no impact statement will be required to accompany a budget request unless an agency has previously conducted a fundamental review of an ongoing program. The preparation of an impact statement will depend on

[37] Under the Court's ruling in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), agency discretion would be subject to review only if its decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."

whether an agency decides to undertake a programmatic review (Pet. App. 18a).[38] Moreover, any EIS initially prepared by an agency could be simply supplemented, or merely referenced, in subsequent budget requests which do not involve substantial changes. The court of appeals correctly understood the incremental nature of the budget process. It noted that very few EISs would have to be prepared in the first instance and that, thereafter, routine operation and maintenance of a program would not require another EIS (Pet. App. 22a-23a).

Furthermore, an agency will know as soon as it begins the programmatic review that an impact statement may be due when it requests appropriations legislation many months later. Under NEPA the consideration of environmental factors must take place at the earliest stages of agency planning and to the fullest extent possible. NEPA, the courts,[39] and the CEQ procedures [40]

[38] Petitioners' fear that the court of appeals' decision will involve the judiciary in agency decisionmaking and invite litigation (Brief for Petitioners at 55) is unfounded. Since an agency will know well in advance when an EIS for certain budget requests will be required, it can fairly be assumed that the agency will fulfill its duty under NEPA to prepare an EIS. The agency's action will have "reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption." *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976). In fact, there will be no need for any judicial involvement or litigation unless and until an agency fails to comply with its congressionally mandated duty.

[39] *See, e.g., Hanly v. Kleindienst*, 471 F.2d 823, 837-38 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) ("one of the purposes of the impact statement is to ensure that the relevant environmental data are before the agency and considered by it prior to the decision to commit federal resources to the project.") (Friendly, C. J., dissenting).

[40] The new CEQ Regulations require agencies to commence the NEPA process "at the earliest possible time." § 1501.2(d)(3), 43

all recognize that impact statements are to be used as managerial tools to enhance informed agency decisionmaking, including decisions on the budget. By preparing and considering EISs before irrevocable budget commitments are made to a specific programmatic course of action, limited agency resources can be allocated so as to maximize the benefits of the agency's efforts. After-the-fact justifications of an agency's budget decisions can only lead to the use of its funds in environmentally unsound ways.[41]

Agencies can be provided with guidelines specifically addressing budget requests, such as those which the court of appeals has directed OMB to prepare, and similar to ones which OMB has prepared in the past.[42]

Fed. Reg. 55,992. "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." § 1501.2, 43 Fed. Reg. 55,992.

[41] The impact statement "shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." § 1502.5, 43 Fed. Reg. 55,995. *See also* Section 102(2)(C)(ii), (v) of NEPA in which Congress describes the content of the impact statement in conditional terms such as "should the proposal be implemented," in order to indicate that the statements are to be analyses of proposals, not excuses for actions. 42 U.S.C. § 4332(2)(C)(ii), (v).

[42] As early as 1971, OMB recognized its responsibilities under NEPA to assist agencies in the preparation of EISs to accompany budget requests. OMB Bulletin No. 72-6 (September 14, 1971) was issued to Federal agencies less than two years after NEPA went into effect. It included the following requirement:

> b. *Annual budget estimates.* Annual budget estimates shall be accompanied by a summary list of those specific actions covered by the estimates which, in accordance with agency procedures, require the preparation of a 102(2)(C) statement. The list shall include . . . the following information by appropriation or fund account:
>
> Column A—*Action, project or activity.* Identify the agency actions and individual projects and activities requiring the preparation of a 102(2)(C) statement.
>
> Column B—*Funds involved.* Identify the amount of funds involved in the budget year, expressed in terms of budget authority and outlays, for those items listed in Column A.
>
> Column C—*Unusual aspects.* Indicate, in each instance, if a draft statement has been completed, whether comments from interested parties have been received, and whether final statements have been completed.
>
> Column D—*Unusual aspects.* Briefly identify unresolved issues, potential controversy, and unusual nature or degree of impact upon the environment.
>
> In the case of programs for which it is not possible to make an assessment of the potential impact on the environment, or to identify 102(2)(C) statements that will be required, agencies may include a narrative statement containing information about general environmental impact and as to when decisions are expected on the need for 102(2)(C) statements.
>
> In addition to submitting the summary list prescribed above, *to facilitate consideration by the Office of Management and Budget of environmental aspects of budget items* [emphasis added], each agency shall, at the earliest time possible, notify the appropriate budget examiner of the Office of Management and Budget of *any action expected to be included in the agency's budget estimate which will have impact upon the environment of particularly significant and/or potentially controversial nature* [emphasis added].
>
> Individual draft or final statements and information to update the listings required above shall be provided by the agencies to members of the staff or the Office of Management and Budget upon their request.

Id. at B-2, B-3.

(Respondents' informal contact with OMB indicates that this Bulletin apparently has been rescinded.)

There is no reason why agencies should find it impossible in practice to comply with the EIS requirement as interpreted by the court of appeals.

Petitioners' contention that the infrequent preparation of impact statements to accompany budget requests will impose an enormous burden is unpersuasive when viewed in the light of the new CEQ Regulations. The Regulations were expressly adopted to relieve significant burden by reducing paper work and delays in EIS preparation. 43 Fed. Reg. 55,978.

Should the Court hold that non-routine requests for budget approval and appropriations are "recommendations or reports on proposals for legislation," agencies would not have to prepare a final impact statement or solicit comments on drafts. § 1506.8, 43 Fed. Reg. 56,001-02. *See also* 40 C.F.R. 1500.12(b) (1978). They would have to prepare a legislative EIS which, in draft form, would be "considered the 'detailed statement' required" by NEPA; and which could be transmitted to Congress up to 30 days after formal transmission of the proposal. § 1506.8(a), 43 Fed. Reg. 56,001. If, on the other hand, requests for appropriations legislation are viewed as recommendations or reports on proposals for major Federal action, the requirement of a final EIS still could be tailored to the legislative process.

Petitioners misconceive the very purpose of Section 102(2)(C). By suggesting that administrative burden may excuse consideration of potential environmental effects, they fail to understand that the procedural requirements in NEPA were meant to improve federal decisionmaking. If that improvement requires greater care in the process of making decisions, such care should not offer an excuse for noncompliance. Respondents find any suggestion of bureaucratic confusion and delay inaccurate, given the intricate and intensive process by which budget decisions are made over a ten-month period. Nevertheless, any burden which conceivably would fall upon agencies would be dissolved by the flexibility of compliance provided in NEPA and the CEQ Regulations. Section 102(2)(C) presents agencies with an opportunity, not a burden.

III. THERE ARE NO CONSTITUTIONAL, STATUTORY OR PRACTICAL REQUIREMENTS OF CONFIDENTIALITY THAT WOULD PREVENT APPLICATION OF NEPA SECTION 102(2)(C) TO THE BUDGET PROCESS.

Section 102(2)(C) provides for more than just a statement to accompany certain recommendations and reports. It requires that these statements be made available to the public in accordance with the Freedom of Information Act, 5 U.S.C. § 552 (1976). Within a few months after NEPA was enacted, the President directed *all* federal agencies to develop procedures for "the fullest practicable provision of timely public information" on the preparation of individual impact statements. Exec. Order No. 11514 § 2(b), 35 Fed. Reg. 4,247. Although NEPA did not direct it, CEQ provided for a three-stage system of impact statement preparation involving preparation of a draft EIS, circulation of the draft for public comment, and preparation of a final impact statement.[43]

Petitioners suggest that, because of the public disclosure provisions of NEPA, application of NEPA to the budget process would raise constitutional, statutory and practical problems (Brief for Petitioners at 32-35, 48-53). Articulation for the public of the existence of environmentally significant proposals is the heart of NEPA. Petitioners' view of the need for total confi-

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[43] *See* 36 Fed. Reg. 7,726 (1971) (1971 Guidelines); 40 C.F.R. § 1500.9 (1978) (current Guidelines); § 1502.9, 43 Fed. Reg. 55,995 (new Regulations).

dentiality in the budget process is disturbing in its implications for the concept of open democratic government. More important, petitioners rest their argument on no solid legal foundation, but on custom and convenience.

In order properly to evaluate the confidentiality claim, careful examination of the court of appeals' holding is required. If the Court deems the agency's budget request to be a "proposal for legislation," then there is no confidentiality problem. Under the new CEQ Regulations, legislative proposals require neither a draft EIS nor any circulation for public comment (except under narrow circumstances not implicating budget requests). The agency EIS is submitted to Congress either with the formal transmission of the proposal by the President or up to 30 days after the proposal is forwarded to Congress, § 1506.8(a), 43 Fed. Reg. 56,001, until which time public disclosure is presumably unnecessary.

Even if a draft statement and public comments were required (as where the request for budget approval and appropriations is treated as a proposal for major Federal action), there would still be little, if any, effect on interagency flow of information. The agency is not required by NEPA to release to the public or to Congress its communications to OMB or to the President with respect to its budget request. Rather, it is required to *prepare* an impact statement based on the budget request and to release *this* statement.

The EIS is a separate, independent document with a statutory significance of its own. It need not detail any of the non-environmental considerations that went into the final agency request. It need not contain or even

paraphrase the interagency communications leading to the budget request; nor must it contain the specific figures which the agency is forwarding to OMB or that OMB is transmitting to the President. It need only describe the significant environmental consequences of the request, focusing on various alternative ranges of funding. Preparation of impact statements will not interfere with the flow of communications among agencies by disclosing raw data and underlying budgetary materials. It would only involve publication of some of the assumptions and factual information inherent in the request.

Petitioners argue that public disclosure of impact statements on budget requests would present a possible violation of the constitutional doctrine of separation of powers and would infringe upon the President's constitutional power to present recommendations for legislation to Congress and to receive the opinions of his cabinet (Brief for Petitioners at 32 & n.22). They base this argument on the assumption that the EIS requirement would be a "procedural restriction on the information the President may receive" (*Id.* at 32). However, it is difficult to understand how preparation of impact statements would restrict the flow of information to the President.[44] If anything, preparation of impact statements with budget requests will *increase* the information available to the President. Also, the publication of an impact statement on an agency budget request will not prevent the President from adopting any

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[44] Petitioners' fears that any relief granted would restrict the flow of information are groundless where, as in the instant case, declaratory relief is sought. Moreover, other forms of relief can be tailored to avoid any constitutional problems. *See generally*, Note, *supra* note 7, at 582-95.

final budget figures he sees fit, nor will it require the revelation of any classified documents or privileged conversations. Compliance with NEPA poses no constitutional hazards.

Petitioners argue that there is a statutory conflict between the public disclosure provisions of NEPA and the Budget and Accounting Act of 1921 (Brief for Petitioners at 51). In order for NEPA to be rendered inapplicable by another statute, there must be a "clear and unavoidable conflict" between NEPA and the other statute—in this instance, the Budget and Accounting Act. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787 (1976).

Specifically with regard to the budget process, OMB itself failed to use the opportunity expressly provided by NEPA to point out any alleged conflict between the Budget and Accounting Act of 1921 and NEPA. Under Section 103 of NEPA, all agencies of the Government were required to review their existing statutory authority, administrative regulations, and current policies and procedures by July 1, 1971, in order to determine whether there were any conflicts between such provisions and NEPA which would prevent full compliance with NEPA. 42 U.S.C. § 4333. Agencies were also directed to present proposals to the President which would bring their authority and policies into conformity with NEPA. *Id.* OMB failed to use this early opportunity, suggesting no such conflict.[45]

[45] As best as we can determine from a review of relevant records on file at CEQ, OMB simply reported that it had no operating programs which affected the environment. Letter from Hon. George P. Shultz to Hon. John D. Dingell (October 15, 1970), *reprinted in Administration of the National Environmental Policy Act: Hearings Before the House Subcomm. on Merchant Marine and Fisheries,* 91st Cong., 2d Sess., app. at 679 (1970). In any event, as discussed *infra* at 65-69, NEPA is wholly consistent with the Budget and Accounting Act, and the Freedom of Information Act exemptions provide no further escape hatch for avoiding preparation of the EIS.

An examination of the provisions of the Budget and Accounting Act upon which petitioners rely reveals no clear and unavoidable conflict with NEPA. Section 201 (a) of the Budget Act provides that the President shall transmit the budget to Congress. 31 U.S.C. § 11(a). Application of NEPA to the budget process does not prevent the President from doing this. Section 206 prohibits agencies from circumventing the President by proposing their budgets directly to Congress. 31 U.S.C. § 15. Preparation and publication of an impact statement by an agency is not a submission of that agency's budget to Congress. Petitioner's heavy reliance on this section is misplaced. Rather than establishing any notion of confidentiality, this provision—in keeping with the underlying legislative purpose of the Budget Act—merely evidences Congress' intention to assure the orderly and simultaneous submission of all agency budget requests to Congress, under uniform accounting procedures. There is nothing on the face of this provision, in its legislative history or in any judicial precedent applying the provision that would give it the meaning claimed by petitioners. Finally, Section 207 requires OMB to organize and transmit to the President the combined federal budget "under such rules and regulations as the President may prescribe." 31 U.S.C. § 16. This provision also does not conflict with NEPA in any way.

Petitioners have referred to a circular issued prior to enactment of NEPA by the Bureau of the Budget which provides that "budget estimates and supporting materials" and "decisions of the President as to his budget recommendations" are to be kept confidential. OMB Circular A-10, ¶ 3, 4 (Rev. Jan. 18, 1964) (A. 225). As previously noted, however, an EIS would not involve disclosure of any of these items.[46] However, even if it did, there would not be any *statutory* conflict which would render NEPA inapplicable to the budget process. Rather, there would be a conflict between the statutory mandate of NEPA and an OMB circular. In such a conflict, the circular must yield to the statute. In short, there is no conflict between NEPA and any statute requiring confidentiality in the budget process.[47]

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[46] Petitioners claim that the cited portions of the OMB circular prevent disclosure of budget materials "in any form" (Brief for Petitioners at 27). In fact, the words "in any form" are never used in the cited paragraphs of the circular (A. 225).

[47] Petitioners also assert that disclosure to the public of impact statements (on budget requests), which is expressly required by Section 102(2)(C) of NEPA, pursuant to the Freedom of Information Act (FOIA), would be impossible since budget requests are "predecisional" documents which are exempt from FOIA (Brief for Petitioners at 50) (*citing Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168 (1975)). Petitioners have once again confused disclosure of the agency budget materials which are forwarded to the President with disclosure of a separately prepared impact statement discussing environmental consequences of budget decisions. Although we contend that budget requests represent final agency proposals, whether they do or not is immaterial for purposes of FOIA, since it is not the requests, but the accompanying impact statements, which will be disclosed. We do not seek the release of any interagency or intraagency documents encompassed by FOIA.

The NEPA statements are not internal memoranda setting forth confidential advice or recommendations. They are documents prepared for the specific purpose of describing for decisionmakers and the public the factual bases for the proposals being considered and the likely environmental impacts of such proposals.

If the claimed exemption protects government officials from preparing environmental statements on proposals for appropriations legislation, the unfortunate and unintended result would be to protect those same officials from preparing EISs on proposals for substantive legislation, or on proposals for major Federal actions. Such actions involve communications and written documents which are protected from disclosure under the fifth exemption in FOIA.

Petitioners also assert that requiring the disclosure to the public of EISs on budget requests would collide with the need for confidentiality (Brief for Petitioners at 51-52). This argument is unpersuasive. Section 102(2)(C) of NEPA expressly requires the disclosure of EISs *in accordance with* the Freedom of Information Act (FOIA). Thus, *if* such EISs were properly regarded as "predecisional" documents exempt from disclosure (as we submit they are not), there would be no conflict with NEPA, since it would not require public disclosure. Moreover, assuming that budget request EISs are exempt from public disclosure under FOIA, petitioners' suggestion that the agency is not required to submit an EIS with its proposal for consideration *within* the government is unsupported. This would violate NEPA's express mandate that agencies comply "to the fullest extent possible." Furthermore, CEQ has specifically adopted a procedure whereby classified information in an EIS can be restricted from public dissemination, while the unclassified portions are disclosed. § 1507.3(c), 43 Fed. Reg. 56,003.

Petitioners are left with policy arguments which essentially defend the political convenience of secretive budget processes. Petitioners argue that disclosure of

impact statements would lead to "political fragmentation of the President's cabinet and Administration," would "injure the President's interest in speaking for his Administration," and would "undermine the confidentiality and reshape the character of the presidential budget process" (Brief for Petitioners at 51-53). Petitioners state these conclusions without explaining how they occur.

The question of disclosure versus confidentiality is not one of absolutes, but one of timing. The decisions underlying some budget information which is publicly detailed in January would be initially revealed in September. (As respondents have pointed out, impact statements would not be required on most portions of the budget.) It seems inconceivable that a three-to-four-month difference in timing could set cabinet member against cabinet member, shatter the unity of the Administration, and destroy the budget process. Moreover, as we stress above, the only disclosure involved in this case is that of an independent document discussing the environmental consequences of, and reasonable alternatives to, ranges of funding for relevant parts of an agency's programs.

However, if complete confidentiality is deemed essential, it can be maintained while concurrently preserving the applicability of NEPA to the budget process. NEPA does not require the preparation of draft EISs or their circulation for public comment. Publication of the agency impact statement can be delayed until the President, having benefited from the information in it, submits his combined federal budget to Congress. The essential purpose of NEPA will have been served by the requirement that agencies consider environmental factors in their decisionmaking, without impairing confidentiality. Moreover, the public will still have the opportunity to comment on the environmental consequences of the budget before congressional committees. Furthermore, an agency need not even identify its preferred alternative in an EIS if "another law prohibits the expression of such a preference." CEQ Regulations § 1502.14(e), 43 Fed. Reg. 55,996. Thus, there are no constitutional, statutory or practical conflicts between NEPA and the agency budget process. Any fears of such conflicts would be alleviated by skillfully limiting the method and timing of disclosure. The purposes of NEPA would be served and the integrity of the budget process maintained.

IV. SECTION 102(2)(B) OF NEPA REQUIRES OMB TO PREPARE METHODS AND PROCEDURES TO GUIDE AGENCIES IN THEIR PREPARATION OF EISs FOR BUDGET REQUESTS.

A. The consistent failure of agencies to comply with NEPA with respect to their budget requests has resulted in confusion over just how NEPA does apply. Petitioners argue that the limiting principle adopted by the court of appeals is "uncertain" (Brief for Petitioners at 54). But the real uncertainty is that resulting from "presently unquantified environmental amenities" which do not receive "appropriate consideration in decisionmaking." 42 U.S.C. § 4332(2)(B).

Under Section 102(2)(B) of NEPA all agencies of the Federal Government must identify and develop methods and procedures in consultation with CEQ to insure that such uncertainty is avoided. As the agency with direct control over the budget process, OMB has a practical and statutory duty to prepare guidelines

for all agencies to aid them in fulfilling their budgetary responsibilities in compliance with NEPA.

It is clear that OMB is an "agency" within the meaning of NEPA. No exclusion for OMB is provided in the Act. NEPA applies to all federal agencies except those engaged in "the performance of staff functions for the President in his Executive Office." § 1508.12, 43 Fed. Reg. 56,004. OMB claims that "*certain* functional units of [OMB] solely advise and assist the President." 5 C.F.R. § 1303.20(b) (1978) (emphasis added). This necessarily implies that *other* units of OMB *do* perform functions as independent entities, thus placing OMB squarely within the scope of NEPA.

Legal precedent supports respondents' position. Even when the President is required personally to approve federal agencies' proposals before they become effective, courts have held that NEPA applies to the agencies. *See, e.g., Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788, 791 (D.C. Cir. 1973) ("approval by the President and compliance with NEPA are two separate statutory requirements"); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, § 35 (D.C. Cir. 1972) (court assumed that the Domestic Council in the President's Executive Office was an agency subject to the requirements of NEPA). In other contexts as well, case law supports our contention that OMB is a creature of Congress which does not operate merely as staff to the President, but also as an independent entity. *See Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (Office of Science and Technology considered an agency for FOIA purposes despite its contention that it served only to advise the President).

Petitioners suggest that CEQ and not OMB should draft the guidelines which respondents seek (Brief for Petitioners at 57-58). Such an interpretation of Section 102(2)(B) would render its language redundant. During consideration of NEPA, Congress clearly assumed that OMB would play a major role in providing guidance to agencies on their compliance with the Act. As the "father" and leading sponsor of NEPA, Senator Jackson also understood OMB's role to be important.[48] He, too, envisioned that OMB would be "requiring that the environmental policies and standards be adhered to in connection with the responsibilities of the Federal establishment." *National Environmental Policy: Hearings Before the Senate Committee on Interior and Insular Affairs*, 91st Cong. 1st Sess. 117 (1969). *See* R. Liroff, A National Policy for the Environment 16-17 (1976).

CEQ itself has consistently recognized that OMB would play a major role in administering NEPA. Every set of Guidelines promulgated on NEPA by CEQ has made specific reference to this role.[49]

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[48] The Court has repeatedly emphasized that in determining legislative intent "[i]t is the sponsors that we look to when the meaning of the statutory word is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). *See FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("substantial weight in interpreting the statute" given to a statement of one of the legislation's sponsors).

[49] *See* [1970] CEQ Ann. Rep. 287; 36 Fed. Reg. 7,724 (1971); 40 C.F.R. § 1500.3(b) (1978). For example, in the 1970 Guidelines, CEQ noted that the Bureau of the Budget would "supplement these general guidelines with specific instructions relating to the way in which the Section 102(2)(C) procedure fits into its legislative clearance process." [1970] CEQ Ann. Rep. 289. The same provision appeared in the Revised Guidelines less than a year later.

That OMB originally must have understood its own responsibilities in shaping the EIS process for agency budget requests is confirmed by its issuance of OMB Bulletin No. 72-6 nearly eight years ago.[50] The Bulletin provided specific guidelines to agencies on their Section 102(2)(C) duties. In short, Congress not only intended for OMB to prepare the guidelines sought by respondents, but OMB has demonstrated that it is fully capable of preparing them.

B. Petitioners assert that respondents do not have standing to assert claims against OMB under Section 102(2)(B) of NEPA (Brief for Petitioners at 60). Respondents requested a declaration that OMB had violated this Section by failing to develop formal methods and procedures which would aid agencies in complying with the procedural requirements of NEPA as applied to the budget process (A. 20). Petitioners argue that respondents "cannot show, as they must, that OMB's failure to adopt such guidelines has 'caused' another agency's failure to prepare an EIS in connection with its annual budget request" (Brief for Petitioners at 60). Petitioners claim that any duty agencies may have to prepare impact statements in connection with budget requests already exists and would be unaffected by the adoption by OMB of guide-

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Thus, a definite role for OMB in implementing the EIS requirements of NEPA as they related to requests for appropriations legislation was clearly contemplated by NEPA, as interpreted shortly after the Act's passage, by CEQ itself. When the existing 1973 Guidelines were promulgated, they too envisioned specific functions for OMB in assessing the environmental impacts of proposed agency action, including "requests for appropriation" legislation. 40 C.F.R. §§ 1500.3(b), (c), 1500.12 (1978).

[50] *See* note 42, *supra*.

lines (*Id.* at 61). Furthermore, they contend, OMB is entitled to a "presumption of regularity," meaning that OMB may assume that agencies will adhere to the NEPA requirement regardless of whether OMB guidelines are issued (*Id.*).

The Court has stated that plaintiffs have standing only if the injury which plaintiffs have allegedly suffered can be traced fairly to the challenged action (or, by implication, inaction in the face of a duty to act) by the defendant, and not if the injury to plaintiffs results from the independent action of some party not before the court. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41-42 (1976). In *Simon* the Court denied plaintiffs standing, because it was merely speculative whether a change in defendants' action in granting tax relief to certain non-parties would have resulted in any change in the conduct of those non-parties towards plaintiffs. *Id.* at 42-43.

Respondents have argued that the non-existence of OMB guidelines has led to the failure of agencies such as DOI to prepare impact statements, a failure which petitioners admit may cause injury to respondents (Brief for Petitioners at 59-60). In the instant case the parties before the Court are officials of OMB and DOI. Therefore, in contrast to the factual situation in *Simon,* all of the parties in the chain of causation are before the Court.

Respondents are also injured by the failure of OMB to consider the environmental information contained in the EIS prior to the transmission of the agency's proposal to the President. *See generally,* Note, *supra*

note 7, at 576-78.[51] Moreover, the efficacy of OMB guidelines need not rest on pure speculation, but may be demonstrated by past experience. In the absence of guidelines on impact statements for budget requests, no such statements have ever been voluntarily prepared by an agency. *See* 43 Fed. Reg. 55,989. Petitioners' "presumption of regularity" fails to stand up in the light of experience, and the presumption of regularity is thus defeated by "clear evidence to the contrary." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 15-16 (1926). Furthermore, respondents are entitled to rely on the same presumption of regularity which petitioners claim. If guidelines existed, respondents may assume that agencies would follow them and prepare impact statements when appropriate. Since the petitioners concede that failure to prepare EISs may cause injury to respondents, respondents clearly have standing to demand that OMB carry out its legal duty

[51] The nature and purposes of NEPA require the recognition of a more attenuated line of causation of injury than would otherwise be allowed. *United States v. SCRAP*, 412 U.S. 669 (1973) (SCRAP I); *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972). *See generally*, Note, *supra* note 7, at 574-75, 578-82.

The district court had the power to allow or require respondents to supply affidavits supporting the allegations of fact upon which respondents' standing was based. *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). The district court failed to do so and did not address the issue of standing. Summary judgment denying standing will normally be granted only if the allegations of injury are shams and the affidavits raise no genuine issues of fact. *Paton v. La Prade*, 524 F.2d 862, 867 (3d Cir. 1975). In any event, if the Court has doubts about respondents' standing to sue on this issue, it should affirm the court of appeals' remand to the district court and allow petitioners specifically to controvert by affidavit any of respondents' allegations concerning standing (Pet. App. 9a).

under NEPA to prepare guidelines that would lead to the preparation of impact statements.[52]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 28, 1979

[52] Petitioners cannot have their argument both ways. If OMB's duty to issue procedures for the preparation of EISs on certain budget requests would constitute an "indirect imposition of this requirement" on the Department of the Interior (Brief for Petitioners at 23, n.15), petitioners seem to be acknowledging that respondents have suffered injury by OMB's failure to prepare such procedures; and, therefore, that respondents have standing to assert claims against OMB under Section 102(2)(B) of NEPA.

* Jerome C. Tinianow, a second-year law student at George Washington University, contributed substantially to the preparation of this brief. Mr. Tinianow is serving as a clerk with the Sierra Club Legal Defense Fund under the George Washington University Legal Aid Program.

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v.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

In accordance with Supreme Court Rule 41(5), respondents wish to call to the attention of the Court the following additional intervening matter which was not available in time to have it included in respondents' brief in chief.

As respondents indicated in note 23 of their brief in chief, on February 19, 1979 respondents sent to several agencies, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), requests for informa-

tion regarding agencies' comments on the proposed new Regulation of the Council on Environmental Quality (CEQ) which defined "legislation." One of the agencies to which a request was submitted on April 11 and April 12, 1979 furnished respondents with a copy of a December 12, 1977 memorandum from Charles Warren, Chairman of the Council on Environmental Quality, who forwarded to the heads of all agencies CEQ's draft Regulations implementing the National Environmental Policy Act (NEPA), including the draft Regulation defining "legislation," a copy of which also has been provided to respondents.[1] That memorandum and draft Regulation are the subjects of the first part of this Supplemental Brief.

As petitioners and respondents both recognize in their briefs in chief, CEQ is the entity specifically entrusted with interpreting the meaning of the action-forcing mandate in NEPA through the promulgation of CEQ's earlier Guidelines and its new Regulations (effective July 30, 1979). Budget requests are no longer considered "proposals for legislation" under the new final Regulations (although those Regulations do not exclude requests for appropriations legislation from the definition of "major Federal action").[2]

The abrupt shift by CEQ in explicitly excluding budget requests from the definition of "legislation" has been justified by CEQ on grounds that "in its

[1] The draft Regulation defining "legislation" was designated Section 1508.15. The proposed Regulation was numbered as Section 1508.16 and appeared in 43 Fed. Reg. 25,245. The final Regulation has been renumbered as Section 1508.17 and appears in 43 Fed. Reg. 56,004.

[2] *See* discussion in respondents' brief in chief at 26-33 and in the footnotes contained therein; and *id.* at 40.

experience . . . preparation of impact statements is ill-suited to the budget preparation process." 43 Fed. Reg. 55,989. In fact, however, at the time when CEQ first prepared its new Regulations to implement NEPA, and forwarded them for review to the heads of agencies on December 12, 1977, CEQ still interpreted the phrase "proposals for legislation" in NEPA to include requests for appropriations.

This consistent interpretation by CEQ followed extensive interaction with the public and the agencies, including public hearings in June 1977 in which CEQ "affirmatively involved NEPA's critics as well as its friends"; detailed responses from over 300 agencies, organizations and individuals "(representing a broad cross-section)" to a 38-page "NEPA Hearing Questionnaire"; and meetings with "every agency of the Federal government to discuss what should be in the regulations." Memorandum from Charles Warren, Chairman, Council on Environmental Quality, to Heads of Agencies, Draft Regulations to Implement the National Environmental Policy Act (NEPA) (December 12, 1977) [hereinafter "Memorandum"]. CEQ was also well aware of judicial interpretations applying NEPA to the budget process. *Id.* at 3. Thus, just six months before its formal proposal, draft Section 1508.15 entitled "Legislation," which accompanied the CEQ Memorandum to the heads of all agencies was precisely the same regulation which was incorporated in proposed Section 1508.16 (43 Fed. Reg. 25,245) and in final Section 1508.17 of the new Regulations (43 Fed. Reg. 56,004), *except* that the phrase "but does not include requests for appropriations" was added in the proposed and final Regulation at what was the end of the first sentence of the draft Regulation.

In short, it is quite clear that CEQ had independently determined at the time of its draft Regulations to maintain its interpretation, which it had consistently made for nearly a decade after the passage of NEPA, that requests for budget approval and appropriations *were* subject to the procedural requirements of NEPA. Sometime between December 12, 1977 and the proposal of the new Regulations on June 8, 1978, the "relentless force called the Office of Management and Budget,"[3] and perhaps other agencies, had exerted sufficient pressure on CEQ to cause CEQ to "flip-flop" on its interpretation. Indeed CEQ noted in its Memorandum that it wanted to "work out appropriate texts for the Regulations that are acceptable to Federal agencies generally," and that it intended "to coordinate as closely as possible with OMB on the budget issue. . . ." Memorandum at 3. In the proposed Regulations themselves, CEQ even referred to the court of appeals' opinion in the instant case and stated that "in consultation with OMB [it] had been prepared to propose this [new] wording." 43 Fed. Reg. 25,245 n.1.

Under these circumstances, CEQ's vague and unsubstantiated justifications for its shift in policy on NEPA's application to the budget process deserve to be given little deference. While it is not clear which considerations motivated CEQ to adopt a position contrary to that in three earlier versions of its Guidelines and to that of several federal courts, its new statutory construction does not appear to be based on any

[3] *Washington Post*, April 12, 1979 at A21, Col. 5-6 (editorial discussing the environmental consequences of the Administration's proposed 1980 budget calling for a 26% cut in rail dollars and a 6% increase in subsidies to other forms of transit).

"new developments" or "experience" which deserve to be accorded any weight.

* * * *

Respondents today have received petitioners' Reply Brief. Rule 41 of the Supreme Court Rules neither specifically provides for nor prohibits the filing of a Reply Brief by respondents. Ordinarily respondents would feel no obligation to respond to petitioners' contentions in their Reply Brief, and normally would avoid burdening the Court with any additional material, by saving any response for oral argument. However, respondents feel obliged to clarify one wholly inaccurate contention of the petitioners which is made throughout their Reply Brief. This response to petitioners' claim is made in accordance with Rule 41(3), by filing this portion of the Supplemental Brief within three days before the scheduled oral argument on April 18, 1979.[4]

Petitioners repeatedly assert that respondents and *amici curiae* have suggested that whenever an agency submits an annual budget request to Congress it "need not prepare and distribute an EIS on that proposal" for appropriations legislation until the President's transmission of the budget to Congress. *See* Pet. Reply Br. at 1-2, 4-6, and n.1. In petitioners' view, respondents' "suggestion" undermines the court of appeals' conclusion that "an agency budget request constitutes a 'proposal' within the meaning of Section 102(2)(C)," *id.* at 1; and the suggestion "appears to raise a question not before the Court." *Id.* at 5.

[4] If leave of the Court is considered necessary, respondents hereby respectfully request permission that this portion of the Supplemental Brief be received for consideration.

Petitioners' characterization of the argument of respondents is wholly inaccurate, and serves only to confuse and mislead the Court in considering the issues before it.[5]

Respondents' brief in chief and the briefs of *amici curiae* are replete with statements and suggestions that agency requests for budget approval and appropriations must be *accompanied* by environmental impact statements (EISs) when the requests first are made, because they constitute either "proposals for legislation" or "proposals for major Federal action."[6] Petitioners have totally misread and mischaracterized respondents' argument, which consistently has been that EISs must be prepared and must accompany certain agency budget requests *by the time* the agency proposals are forwarded to the Office of Management and Budget (OMB). We have further pointed out that, if a budget request is considered a "proposal" under NEPA, public *disclosure* of the EIS prepared on that proposal *may* appropriately await the President's transmission to Congress of the agency's legislative proposal for appropriations.

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[5] It is the petitioners who have inappropriately characterized the first question which is presented to the Court. As respondents' first question indicates, and as The Wilderness Society as *amicus curiae* points out in its brief at 3, the main issue before the Court is whether certain budget requests fall within the terms of NEPA, thereby requiring the preparation of an EIS at the time such a proposal is made; not whether *every* annual budget request so requires the preparation of an EIS.

[6] *See, e.g.*, Resp. Br. at 7, 9-10, 42-44, 50-51, 56, 57, 60, 68; Br. of National Wildlife Federation and Defenders of Wildlife as *amici curiae* at 7-8, 9, 10-11, 19-20; Br. of The Wilderness Society as *amicus curiae* at 5, 7-8, 8-9, 28, 30.

Our brief in chief emphasizes throughout that, among others, one purpose of an EIS is to ensure that relevant environmental data are in front of an agency and considered by it in the critical decision-making process involving preparation of the budget. *See* Resp. Br. at 42-44. In this way the EIS serves as an effective management tool. We point out that an EIS which accompanies a budget request will give the President a clear understanding of the environmental consequences which may be triggered by Congress' action on the agency proposal for appropriations legislation. *Id.* at 44. To serve that purpose, obviously, the EIS needs to be prepared *before* OMB or the President receives the agency's proposal.[7] A proper reading of our brief in chief makes it quite clear that we have never suggested anything to the contrary. Further, we have referred approvingly to the several Federal court decisions which have held that appropriations requests are "proposals" under NEPA requiring preparation of an EIS at the time the requests are submitted to OMB. *See* Resp. Br. at 52-54.

In short, respondents have always asserted (and nothing in our brief in chief is intended to imply anything to the contrary) that (1) certain agency budget requests are "proposals for legislation" and/or "proposals for major Federal action" under NEPA; and that (2) Congress, under the terms of NEPA, has re-

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[7] Conceivably, petitioners' confusion may stem from their failure to understand that final agency budget requests which propose a considered programmatic course following a programmatic review come within the terms of NEPA although they are forwarded through OMB and the President before they arrive for legislative consideration by Congress. Under Sections 214 and 215 of the Budget and Accounting Act of 1921 agencies are required to prepare annual budget requests and to submit them to OMB. 31 U.S.C. §§ 22, 23.

quired that agencies submit an EIS to OMB with each such proposal. Respondents and *amici curiae* have referred to the flexibility of NEPA in permitting for the delayed *public disclosure* of the already prepared EIS. We have done so in connection with our response to petitioners' contention that the budget process must remain entirely confidential, and that nothing related to any budget request, including an independently prepared EIS which discusses the environmental consequences of operating an ongoing program at various levels of appropriations, may be publicly disclosed before the request for appropriations legislation is before the Congress.

Respondents and *amici curiae* contend that EISs must be prepared and must *accompany* certain agency proposals for appropriations legislation by the time such proposals are forwarded to OMB. To the extent that any of the briefs submitted in support of this position imply anything to the contrary—and we vigorously assert they do not—we wish to clarify any such implication in the context of the above-stated remarks.

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents and the amici curiae contend that an agency makes a "proposal" within the meaning of Section 102(2)(C) of NEPA when it submits its annual budget request to OMB in September of each year. They suggest, however, that even though the agency's budget request is a "proposal" at the time it is submitted to OMB, the agency need not prepare and distribute an EIS on that proposal until the President has submitted the Budget to Congress in January of the following year (Resp. Br. 9-10, 60; Br. of National Wildlife Federation 20; Br. of Wilderness Society 26 n.20). This suggestion marks a significant departure from the judgment of the court of appeals, which requires that an EIS be prepared to accompany the budget request at the time it is sent by the agency to OMB. Respondents' concession undermines the court's conclusion that an agency budget request constitutes a "proposal" within the meaning of Section 102(2)(C),

and it provides no alternative ground for defending the decision below.

a. Respondents argue that an agency's funding request to OMB constitutes a "proposal" under Section 102(2)(C) because "[n]o further action by the agency is required after the submission of its request for budget approval and appropriations" to OMB (Resp. Br. 45). But even if the agency has "said its last word" in transmitting its budget request to OMB, that does not make its budget request a "proposal" under NEPA.[1] As we explain in our opening brief (Br. 29-31), Congress has located the authority to propose appropriations exclusively in the President and has precluded the agencies from submitting independent budget requests to Congress.[2] Since the agencies have no authority to submit appropriations proposals to Congress and indeed are prohibited by statute from doing so,[3] their budget requests to OMB constitute only a part of the "germination process" of the President's Budget and

[1]If it did, similar reasoning would apply to the "final" budget request by the Fish and Wildlife Service to the Secretary of the Interior, and so on for component units of the Fish and Wildlife Service.

[2]Congress has enacted exceptions to allow only three agencies to submit appropriations proposals to Congress (Br. 53 n.43).

[3]This incapacity distinguishes this case from the cases cited by respondents (Resp. Br. 48-50 & n.33), in which an agency was acting either by itself or in concert with another agency with respect to a proposal that the agency was competent to make. Where the agency has power to make a proposal, either for legislation or for major federal action, the fact that its proposal may be rejected by another agency or by the President does not make NEPA inapplicable to the proposal. See *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 788, 791 (D.C. Cir.), injunction denied, 404 U.S. 917 (1971). Under the Budget and Accounting Act, however, the agencies are precluded from making appropriations proposals; instead, they are directed to assist the President (pursuant to such procedures as the President may establish, 31 U.S.C. 16, 24) in the preparation of the President's Budget.

are therefore not subject to the EIS requirement of Section 102(2)(C). *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976).[4] As the court concluded in *Alaska* v. *Carter*, 12 E.R.C. 1486, 1490-1491 (D. Alas. 1978), NEPA does not require an agency to prepare an EIS when, at the President's request, it provides information or advice in connection with the exercise of an authority that is vested by statute exclusively in the President.[5]

[4]Respondents' suggestion (Resp. Br. 21-22) that the President has only a "relatively minor" role in formulating the Budget is unsupported and startling. The Budget and Accounting Act assigns essentially complete authority over the preparation of the Budget to the President. 31 U.S.C. 11. See also Br. 23-27. What the President submits to Congress is not, as respondents would have it (*e.g.*, Resp. Br. 21, 45), the "combined" federal budget. It is the single, unitary federal Budget; as Section 201(a) of the Budget and Accounting Act provides (31 U.S.C. 11(a)), "[t]he President shall transmit to Congress * * * the Budget * * *."

[5]Respondents express assurance (Resp. Br. 63) that requiring preparation of an EIS at the time the agency budget request is transmitted to OMB will not interfere with the President's constitutional authority to submit proposals to Congress and to obtain the opinion of his officers (U.S. Const. Art. II, Secs. 2, 3), since in their view the requirement will increase, rather than restrict, the information available to the President. But such an EIS requirement would stand between the President and the prompt counsel of his officers. For example, on respondents' theory an EIS may be required not only for an agency's initial budget submission to OMB, but also for answers to presidential inquiries concerning significant alterations in the agency's funding request. In view of the very short time span in which the Budget is prepared, such a restriction would impede presidential participation in the preparation of the Budget. The President would be compelled either to accept the agency's initial view, or to depart from it without the benefit of additional guidance from the agency. The Constitution, however, provides without limitation that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. Art. II, Sec. 2. See *Alaska* v. *Carter*, *supra*, 12 E.R.C. at 1491. See generally Proto, *The Opinion Clause And Presidential Decision-Making*, 44 Missouri L. Rev. 185 (1979).

Respondents are wrong in stating (Resp. Br. 43) that, if we are correct, then "any agency proposal for environmentally-significant legislation would be exempt from NEPA whenever it required a submission to Congress after legislative clearance through OMB." Respondents apparently assume that, after clearance from OMB, legislative proposals are submitted to Congress only by the President. On the contrary, as we noted in our opening brief (Br. 36, n.26), legislative proposals are ordinarily submitted to Congress, following clearance from OMB, by the interested agencies and not by the President.[6] Hence there is no danger that agency proposals for environmentally-significant legislation would be generally exempt from NEPA on the ground of presidential submission. There is no statute that prevents agencies from proposing legislation to Congress, as there is with respect to appropriation requests (31 U.S.C. 16). Nor is there any statute that centralizes the responsibility for proposing legislation in the President, as there is with respect to appropriations (31 U.S.C. 11). Thus agencies may and do submit legislative proposals to Congress, and when they do, they may be required to prepare an EIS in connection with those proposals (see our opening brief at 36 n.26). (Congress may, of course, refuse to act on a legislative proposal pending the preparation of an EIS if it believes that an EIS is appropriate or required.)

b. The court of appeals concluded that an agency makes a "proposal[ ] for legislation" within the meaning of Section 102(2)(C) at the time it submits its budget request to OMB, although the court limited its holding to budget requests that would "significantly change[ ] the status quo" or that

[6]Unlike the Budget, legislative proposals usually are not submitted to Congress by the President alone. In the typical case, even when the proposal is announced by the President, its actual submission is made by the interested agency.

reflect a "new look" at the agency's program. The court concluded that an EIS must be prepared "to accompany" such budget requests at the time they are transmitted to OMB (Pet. App. 2a; see *id.* at 14a, 17a, 18a, 22a). Respondents suggest (Resp. Br. 60), however, that an agency could satisfy its NEPA responsibility by transmitting an EIS on its budget request, not at the time it submits the request to OMB, but *after* the Budget has been submitted to Congress by the President.[7]

Respondents' suggestion is a significant withdrawal from the position of the court of appeals. It appears to constitute a recognition that there is no "proposal" that could invoke the EIS requirement until the time the Budget is transmitted to Congress by the President. See note 7, *supra*. It also appears to raise a question not before the Court. This case has never presented any question concerning what obligation agencies might have to prepare an EIS in connection with the President's submission of the Budget to Congress (see Br. 31 n.22). The question that has been litigated in this case—and that is presented for review in this Court (Pet. 2)—is whether agencies must prepare an EIS in connection with their

[7]Respondents cite (Resp. Br. 60) Section 1506.8(a) of the new CEQ regulations, which provides that an EIS is to be distributed in connection with a proposal for legislation within 30 days after the proposal is transmitted to Congress. 43 Fed. Reg. 56001 (1978). Although this section applies only to "proposals for legislation," respondents casually indicate that their suggestion "still could" apply whether budget requests are proposals for "legislation" or proposals for "major Federal action" (Resp. Br. 60). But Section 1502.5 of the new CEQ regulations provides that an EIS prepared in connection with a proposal for "major Federal action" is to be distributed in final form as part of the proposal. 43 Fed. Reg. 55995 (1978). Since respondents contend that an agency's budget submission *to OMB* may be a proposal for major federal action, the suggestion that the EIS may be deferred for several months thereafter is contrary to the regulations. See also *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.

annual budget requests to OMB.[8] If respondents now concede that the EIS requirement is inapplicable at the time the agency submits its budget request to OMB, and applies only when the Budget is submitted by the President to Congress, they have abandoned the decision of the court of appeals and are raising here an issue not raised in the courts below.

It is difficult to follow respondents' suggestion in any event. Since it is the President, rather than the agency, who "proposes" the Budget to Congress, the head of the agency is not the "responsible official" who, under Section 102(2)(C), would be required to prepare an EIS at the time of the President's proposal. And since the President is not an "agency," and therefore is not subject to NEPA, the President also is not required to prepare an EIS in connection with the Budget (Br. 31-32 n.22). The President's submission of the Budget to Congress thus creates no NEPA responsibility for either the President or the agency.[9] Respondents' suggestion that an agency should prepare an EIS in connection with the President's Budget should therefore be rejected, even if it were properly presented in this case.

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[8]Respondents suggest (Resp. Br. 13-14 n.6) that even this question is no longer in the case, because the court of appeals reversed the judgment of the district court insofar as it required Interior to prepare an EIS in connection with every annual budget submission to OMB (Pet. App. 19a). But the decision of the court of appeals requires the Secretary of the Interior to prepare an EIS in connection with every budget request meeting the court's specifications. Moreover, the court of appeals expressly contemplated that OMB would be required to issue regulations directing federal agencies (including Interior) to prepare an EIS for such budget requests. Thus, the validity of the judgment below remains in genuine controversy for both petitioners. See Br. 22 n.15.

[9]Nor does this case raise any question of whether an agency must prepare an EIS if, subsequent to the President's submission of the Budget, the agency prepares a report or recommendation on the Budget or any part of it.

2. We argued in our opening brief (Br. 34-55) that, even if the agency's budget submission to OMB were a "proposal," it is not a "proposal for legislation" under NEPA. We noted that Congress has maintained a sharp distinction in its use of the words "legislation" and "appropriation," and does not use the former term to include the latter. To this respondents reply (Resp. Br. 34) that, "[i]n common parlance, the word 'legislation' is not a term of art," but refers to all enactments of Congress, including appropriations. In view of the deeply engrained distinction maintained by Congress in its usage of the terms "legislation" and "appropriation," however, it is apparent that in the "common parlance" of Congress an appropriation request is not a "proposal for legislation."[10] There is nothing in the history of NEPA to suggest that Congress intended to depart from its customary usage of the term "legislation" in enacting Section 102(2)(C) (see Br. 35-39).[11]

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[10]Respondents claim (Resp. Br. 30-31) that the recent CEQ regulation that provides that proposals for legislation do "not include requests for appropriations" (Section 1508.17, 43 Fed. Reg. 56004 (1978)) is entitled to no weight because, respondents assert, CEQ has not articulated the basis for its new position on this issue. In fact, CEQ explained the considerations that led it to adopt the new regulation and the reasons why it concluded "that preparation of EISs is ill-suited to the budget preparation process" (43 Fed. Reg. 55989 (1978)) (see Br. 42).

Despite respondents' claim (Resp. Br. 58 n.42), nothing in OMB Bulletin No. 72-6 (Sept. 14, 1971), expired June 30, 1972, ever provided to the contrary. This Bulletin required agencies to inform OMB as to (1) which "specific actions" the agency planned to take for which an EIS would be prepared, and (2) which agency actions would have a significant environmental effect. It did not require agencies to prepare an EIS in connection with any budget request. Nor do any regulations of the Department of the Interior require an EIS to be prepared in connection with budget requests (Pet. App. 47a-48a n.17).

[11]Respondents argue (Resp. Br. 35) that, since Congress has not amended NEPA or otherwise acted to reject the decision of the court of appeals, Congress must approve of the decision below as the proper

Respondents argue (Resp. Br. 38) that even if an appropriation is not "legislation," it is nonetheless a "major Federal action" and thus subject to the EIS requirement of Section 102(2)(C). They contend (Resp. Br. 39) that when a federal agency forwards "a request for budget approval to take an action significantly changing the status quo," the agency's budget request is a proposal for "major Federal action." They reason (Resp. Br. 40, 41) that since "[p]rojects of a localized nature have frequently been characterized as 'major Federal actions[,]' * * * appropriations of potentially nationwide scope should similarly qualify." Although this broad theory was adopted by the district court (Pet. App. 52a), the court of appeals declined to accept it.[12] The theory lacks merit and provides no basis for upholding the judgment of the court of appeals.

a. Respondents' attempt to analogize departmental budget requests to "[p]rojects of a localized nature" is unavailing. As we explained in our opening brief (Br. 45 n. 34), when a planned expenditure leads to some major implementing action—for example, the construction of a dam—an EIS will be prepared for that action. This is because the underlying project or action, and not the appropriation for it, constitutes major federal action. When Congress enacts an appropriations bill, it authorizes the establishment of an account from which funds may be expended; it is the expenditure of those funds on

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construction of the statute. This suggestion is frivolous. A far more significant indication of congressional intent exists in the fact that Congress, obviously aware that the President and the agencies have not submitted environmental impact statements with appropriations requests during the ten years since NEPA was enacted, has done nothing to impose such a requirement.

[12]The court of appeals noted (Pet. App. 15a-16a; footnote omitted) that "[t]he cases requiring an EIS in connection with appropriations requests involve proposals for construction or development of a project." As we discuss below, it is the underlying project decision, and not the appropriation request, that may constitute "major Federal action."

particular projects that, in some circumstances, will constitute major federal action.[13] CEQ noted in the preamble to its recent regulations that the fact that requests for appropriations themselves are not subject to NEPA under Section 102(2)(C) does not relieve "agencies of responsibility to prepare statements when otherwise required on the underlying program or other actions." 43 Fed. Reg. 55989 (1978). Conversely, the fact that an underlying program decision may constitute major federal action is no basis for imposing an additional EIS requirement on the appropriations process.

b. Respondents' construction of the statute would yield "absurd or futile results." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). The "major Federal action" provision of Section 102(2)(C) has been applied to projects as narrow in scope as the construction of a single post office (*City of Rochester* v. *U.S. Postal Service*, 541 F. 2d 967 (2d Cir. 1976)); the making of a loan to finance construction of a housing redevelopment project (*San Francisco Tomorrow* v. *Romney*, 472 F. 2d 1021 (9th Cir. 1973)); and the sale of timber on federally administered lands (*Minnesota Public Interest Research Group* v. *Butz*, 358 F. Supp. 584 (D. Minn. 1973),

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[13]In *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164 (6th Cir. 1972), the court of appeals concluded that an EIS should be prepared for a dam that had been begun, but not completed, before enactment of NEPA. The court concluded that "the continuing construction" (*id.* at 1180) was major federal action under Section 102(2)(C). The judgment in that case was not dependent on the court's additional conclusion that the appropriation request is a "proposal for legislation" (468 F. 2d at 1181). It is nonetheless noteworthy that the court did not conclude that the *appropriation* was itself "major Federal action," as respondents now contend. Instead, the major federal action was "the continuing construction of the project" (*id.* at 1180).

aff'd, 498 F. 2d 1314 (8th Cir. 1974) (en banc)). If a departmental budget request is "major action" because it is a "proposal" or "plan of action" (Br. of National Wildlife Federation 13) directed toward the accomplishment of underlying decisions that themselves involve "major Federal actions," it is apparent that *all* departmental budget requests would be subject to NEPA. The court of appeals correctly concluded with regard to a similarly broad claim—that every departmental budget request constitutes a "proposal for legislation"—that the statute should not be construed to reach such "ridiculous extremes" (Pet. App. 22a-23a; see *id.* at 17a). See also Br. 45-48.

Accordingly, respondents have offered numerous formulations to restrict application of their theory. They suggest that an agency's budget request constitutes "major Federal action" when it follows a "painstaking" or "intensive" review of the agency's program or when it would "significantly chang[e] the status quo" or result in a "major chang[e] in an agency's program" (Resp. Br. 39). They refer to such a budget request as a "programmatic change" (*ibid.*).[14]

Respondents' attempt to formulate a "limiting principle" (Pet. App. 15a, 16a) for its "major Federal action" analysis is no more supportable than the similar effort of the court of appeals in its discussion of "new look" budget requests as "proposals for legislation" (see *id.* at 16a-18a; Br. 53-55). If a budget request is a proposal for "major Federal action" simply because it seeks funding for a major underlying program decision, then it should not matter whether

[14]Elsewhere in their brief, respondents refer to such budget requests as "non-routine requests for budget approval" (Resp. Br. 60), and, on a single page (Resp. Br. 56), they describe such requests variously as involving a "painstaking review," a "considered review," a "programmatic review," or a "fundamental review" of an agency's program.

the underlying decision was the result of "intensive" or "painstaking" review. Similarly, if an underlying decision is made to accomplish some major federal action, it should not matter whether the budget request for that action constitutes a "major chang[e] in an agency's program" or a "programmatic change." To the extent that an EIS may be required in these situations, it would be required for the underlying program decision and not for the agency's budget request.[15] Thus, as with the similar "limiting principle" offered by the court of appeals, respondents' analysis is divorced from the language and history of the statute; it "would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation." *Kleppe* v. *Sierra Club, supra*, 427 U.S. at 406.[16]

[15]In suggesting that a budget request that follows "painstaking review of an ongoing program" and "significantly chang[es] the status quo" is a proposal for major federal action, respondents rely on a portion of the Senate Report on NEPA that refers to major actions as "project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs." S. Rep. No. 91-296, 91st Cong., 1st Sess. 20 (1969). But it is the "expansion or revision" of the program, and not the appropriation request, that may constitute the major action. This is illustrated by *Virginians for Dulles* v. *Volpe*, 541 F. 2d 442 (4th Cir. 1976), on which amicus Wilderness Society relies (Br. 15). In that case, the court found that a " 'major modernization' " of an airport to allow a "vastly expanded use" was a revision of an ongoing program that constituted major federal action under Section 102(2)(C) (541 F. 2d at 445). The court required an EIS to be prepared in connection with the expansion of operations at the airport; it did not hold or suggest that an EIS should be prepared in connection with the agency's request for appropriations.

[16]Moreover, as has been discussed above, only the President may propose the Budget. Thus, even if an appropriation constituted "major Federal action," there is no "proposal" for such action under NEPA until the President's Budget is submitted to Congress. See pages 1-6, *supra*.

3. Respondents claim (Resp. Br. 69) that the preparation and distribution of an EIS at the time an agency submits its budget request to OMB would not interfere with any necessary executive confidentiality or presidential discretion.[17] They claim (*id.* at 66) that NEPA disclosure would conflict only with an executive policy of confidentiality (OMB Circular A-10; see Br. 52-53) and that the statute, rather than the executive policy, must control.

This argument misperceives the nature of our original submission. We did not argue that NEPA is inapplicable to agency budget requests *because* its application would breach executive confidentiality. We contended that it is inconceivable that in enacting NEPA Congress intended—without ever so stating—to overturn the long-standing practice of confidentiality for Executive Branch discussions leading to the formulation of the President's Budget (Br. 50-53). We showed that the executive practice is not only long-standing, but is consistent with Congress's intent in the Budget and Accounting Act to centralize in the President the political responsibility for the formulation of the Budget (Br. 51-53; see *id.* at 24-25). By compelling a premature disclosure of "unrelated, and unrevised [estimates from individual agencies] representing the personal views and aspirations of bureau chiefs" (S. Rep. No. 524, 66th Cong., 2d Sess. 6 (1920)), the decision of the court of appeals construes NEPA to achieve a result at odds with the intent of Congress in enacting the Budget and Accounting Act. See our opening brief at 25.

[17]They argue, apparently in the alternative, that if the EIS need not be prepared until *after* the President submits the Budget, then there is no interference with executive confidentiality (*id.* at 62). But any question concerning the obligation of agencies to prepare an EIS in connection with the President's Budget after it is submitted to Congress is not properly presented in the case. See note 16, *supra*.

Respondents assert that a premature disclosure of individual agency budget requests would not seriously interfere with executive confidentiality because the EIS could focus "on various alternative ranges of funding" and on "some of the assumptions and factual information inherent in the request" (Resp. Br. 63). It is precisely the agency's choice of "alternative ranges of funding," as well as "the assumptions * * * inherent in the [agency's] request," that are treated as confidential under executive practice (see Br. 52-53). Moreover, the EIS requirement may well demand a more detailed elaboration of the agency's "proposal" than respondents have suggested. The statute requires, among other things, an analysis of the environmental impact "of the proposed action" (42 U.S.C. 4332(2)(C)(i)), of "alternatives to the proposed action" (42 U.S.C. 4332(2)(C)(iii)), and of "any irreversible * * *commitments of resources which would be involved in the proposed action should it be implemented" (42 U.S.C. 4332(2)(C)(v)). It is simply speculation on respondents' part that an EIS could be prepared to conform with these criteria without revealing the agency's advice to the President on its budget request. Finally, the custom of confidentiality is intended not only to protect the President's discretion to choose among alternatives that the agency has presented, but also to preserve his discretion to choose an alternative that the agency has *not* presented or even considered. Disclosure of the agency's independent analysis of what it regards as "reasonable" alternatives would undermine this objective of the budget process.[18]

[18]Respondents appear to acknowledge that their position on the applicability of NEPA would compel important if not fundamental changes in the nature of the budget process. They question "the political convenience of secretive budget processes" as those processes now exist (Resp. Br. 67), and they attempt to minimize the political and institutional impact of imposing "a three-to-four-month difference in timing" (*id.* at 68) upon an annual process. We continue to find it inconceivable that Congress in enacting NEPA intended to reshape the budget process in such important respects—whether or not Congress would have power to do so.

4. With regard to our contention that respondents lack standing under Section 102(2)(B) to seek an order directing OMB to promulgate regulations requiring federal agencies to do what (by hypothesis) the statute already requires them to do (Br. 59-61), respondents simply repeat their contention that OMB guidelines "would lead to the preparation of impact statements" (Resp. Br. 75). But the fact that, before the decision in this case, agencies did not prepare EISs for "new look" budget requests does not support a contention that, if the decision is affirmed in this Court, agencies will refuse to comply with the decision in the absence of OMB guidelines. Respondents' "unadorned speculation" does not provide standing under Section 102(2)(B). *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976); *id.* at 45 n.25.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

APRIL 1979

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*The Solicitor General is disqualified in this case.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, Secretary of the Interior; and JAMES T. McINTYRE, JR., Director, Office of Management and Budget, *Petitioners,*

v.

SIERRA CLUB, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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OCTOBER TERM, 1978

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v.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42, written consent to the filing of this brief was sought and obtained from counsel for all parties, and the documents indicating such consent have been filed with the Clerk of the Court.

The Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing for the purpose of engaging in litigation in matters affecting the broad public interest. The

Foundation has over five thousand contributors and supporters throughout the United States. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens.

The Pacific Legal Foundation strongly supports the development of sound policies for implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, and has participated as an amicus curiae before this Court in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, ___ U.S. ___, 98 S. Ct. 1197 (1978). The Foundation believes that the "rule of reason" propounded by the Court of Appeals embodies an incorrect perception of the appropriate standard of judicial review to be applied to agency decisions regarding NEPA obligations. In addition, the Foundation believes that the injury complained of by respondents is too remote and speculative to support standing.

Pacific Legal Foundation concurs with petitioners that NEPA does not apply to the deliberative process of preparing the budget. However, Pacific Legal Foundation has chosen to address other issues in this brief which may not be fully dealt with by petitioners. Pacific Legal Foundation brings to this case a perspective not presently represented. Petitioners present the important concern that the confidentiality and integrity of the budget process be protected from ill-conceived applications of NEPA. Respondents supply the perspective of citizens in support of increasing the amount of input regarding environmental consequences in the administrative and legislative processes. Pacific Legal Foundation represents a different public interest, which is concerned that the scope of NEPA not be unreasonably expanded and used by the judiciary to invade the decision-making processes of the Executive branch. The public interest would be better served by a construction of the Act which, while ensuring that agencies consider environmental values, refuses to sanction use of NEPA as an impediment to the ongoing deliberative processes of government. Participation by Pacific Legal Foundation in this case will assist in obtaining fuller consideration of the public interest issues.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit, in the opinion reported at 581 F.2d 895 (D.C. Cir. 1978), declared that NEPA requires the preparation of an environmental impact statement (EIS) for agency budget proposals to the Office of Management and Budget (OMB) which either change the status quo or usher in a "considered programmatic course following a programmatic review." 581 F.2d at 903. The court also upheld the judgment of the district court that OMB must "initiate the delineation of the procedures required by NEPA in connection with the budget process." 581 F.2d at 905. The opinion of the district court is reported at 395 F. Supp. 1187 (D.D.C. 1975).

INTRODUCTION

This Court's recent decisions in *Kleppe v. Sierra Club, supra,* and *Vermont Yankee, supra,* have interpreted the limits of judicial intervention in reviewing agency compliance with NEPA. This case presents the Court with the question of the proper scope of review to be adopted in NEPA actions, which was acknowledged but not addressed in *Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 326 n.28 (1975).

There continues to be a serious split in the Courts of Appeals regarding the appropriate standard of review to be applied to agency actions under NEPA. The two standards acknowledged in *SCRAP II, id.*, have evolved into three major standards with numerous lesser variations. The Court of Appeals' decision in this case marks the advent of yet a fourth standard. As this Court has recognized,

> the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, [and] the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals. *Vermont Yankee*, ___ U.S. at ___, 98 S. Ct. at 1208 n.14.

The application by the Courts of Appeals of differing standards of review to the same federal agencies has inhibited coherent development of NEPA law. Confusion reigns as to what is the proper standard. The uncertainty created by these conflicting standards has encouraged courts to fashion additional measures unsupported by either the plain words of NEPA or the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 500, *et seq.*

A decision by this Court delineating the proper role of the judiciary in reviewing agency actions under NEPA will provide a measure of stability and predictability in this area of the law. What is needed is a clear and uniform standard of review of compliance with NEPA. This will enable administrative agencies to make informed judgments on the application of NEPA requirements. This stability of standards of judicial review is necessary to ensure that NEPA will serve its intended purpose of facilitating informed agency decision-making, rather than paralyzing important administrative functions with indecision spawned by court-devised factors applied in flexible and therefore uncertain manners. It will also serve to lessen the constant flood of litigants whose eagerness to force preparation of "adequate" environmental impact statements is exceeded only by their ingenuity in discovering factors which were never "properly" considered.

ARGUMENT

I

THE COURT OF APPEALS HAS APPLIED AN INCORRECT STANDARD OF REVIEW

A. The Courts of Appeals Have Applied Inconsistent Standards of Review to Agency Actions Under NEPA

The federal courts, in enforcing agency compliance with NEPA, have adopted various standards for judicial review of agency decisions on whether or not to file an environmental impact statement (EIS), and for review of the sufficiency of EIS

contents. The principal tests used include the "reasonableness" test, the "without observance of procedure required by law" standard of 5 U.S.C. § 706(2)(D), the "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" standard of 5 U.S.C. § 706(2)(A), and the "rule of reason". Until the present case, this last rule has served only as a standard of review governing the sufficiency of an EIS.

The standard of review employed most frequently in the circuits is one of "reasonableness". The Eighth Circuit[1] considers this measure to be appropriate for the following reasons:

> An agency decision concerning NEPA requirements is not one committed to the agency's discretion by law within the meaning of the APA, 5 U.S.C. § 701 et seq. The Congressional command that agencies cooperate in attaining the goals of NEPA "to the fullest extent possible" requires the courts to look at the good faith efforts of the agency to comply. To upset an agency determination not to prepare an impact statement, it still must be shown that the agency's determination was not reasonable under the circumstances. This will require a showing that the project could significantly affect the quality of the human environment. We therefore hold that review of an agency's determination not to prepare an impact statement should be measured by its reasonableness in the circumstances, not as to whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 1320 (8th Cir. 1974) (footnote omitted; citation omitted).

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[1] Other circuits in which this standard of review, or a variant thereof, has been utilized include the Fifth, in *Save Our Ten Acres v. Kreger,* 472 F.2d 463 (5th Cir. 1973) (employing a "strict reasonableness" test); the Third, in *Township of Ridley v. Blanchette,* 421 F. Supp. 435 (E.D. Pa. 1976); and the First, in *Mont Vernon Preservation Society v. Clements,* 415 F. Supp. 141 (D.N.H. 1976).

The scrutiny of agency action under the "reasonableness" standard is stricter than under the "arbitrary and capricious" standard. This is attributable to the heavy degree of importance placed on NEPA's purpose by the courts. As stated by the Tenth Circuit,

> the proper standard ... is whether the negative determination was reasonable in the light of the mandatory requirements and high standards set by the statute so as to be "in accordance with law"—another ground of review in § 706(2)(A) which may be applied consistently with the procedural demands of NEPA. *Wyoming Outdoor Coordinating Council v. Butz,* 484 F.2d 1244, 1249 (10th Cir. 1973) (footnote omitted).

The Ninth Circuit employs the "without observance of procedure required by law" standard, and has justified its use by maintaining that

> NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them .... That result can be achieved only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do. We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply § 706(2)(D) in reviewing environmental impact statements for compliance with NEPA than if they confine themselves within the straight jacket [*sic*] of § 706(2)(A). *Lathan v. Brinegar,* 506 F.2d 677, 693 (9th Cir. 1974).

Yet that court has admitted in a subsequent case that "[t]he standard presently is more *ad hoc* in character than might be thought proper." *Cady v. Morton,* 527 F.2d 786, 793 (9th Cir. 1975). Indeed, the standard allows reviewing courts so much latitude that the Ninth Circuit has remarked that the problem with it

> lies in the fact that the "procedure required by law" by which sufficiency of the EIS is measured consists substantially of judicial responses to specific allegations of insufficiency directed at specific impact statements prepared in connection with particular projects that were challenged in various federal courts. Neither NEPA nor the "Guidelines" of the Council on Environmental Quality set forth sufficiently comprehensive "procedures" to obviate the necessity to resort to such judicial responses. The consequence has been and, to a degree, is that the judicial review of the adequacy of an EIS employs standards fashioned to meet the needs of the particular case in which the standards are applied. In due course the presence of a large volume of case law and the principle of *stare decisis* will yield reasonably precise "procedural rules" by which the adequacy of an EIS can be measured. That time, however, has not arrived. *Trout Unlimited v. Morton,* 509 F.2d 1276, 1282-83 (9th Cir. 1974).

Use of this standard allows a much greater degree of judicial intervention in the administrative process, and invites the court to substitute its judgment for that of the agency, under the guise of passing upon the sufficiency of an EIS. It allows the court to review questions of fact, a determination of which is, and properly should be, left with the agencies.

The other main standard of review is under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" test. This Court, in a non-NEPA case, held that a determination under this test requires a court to

> consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. [Citations omitted.] Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a

narrow one. The court is not empowered to substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

This standard has explicitly been held applicable to challenges to agency action arising under NEPA. The Second Circuit[2] has indicated that it sees

> no reason for application of a different approach here since the APA standard permits effective judicial scrutiny of agency action and concommitantly [sic] permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise. Accordingly we conclude that the applicable scope of review of an agency's threshold determination that an impact statement is not required under § 102 of NEPA is the "arbitrary, capricious, abuse of discretion" standard. *Hanly v. Kleindienst,* 471 F.2d 823, 829-30 (2d Cir. 1972).

Necessarily, the scope of review under this standard is much more limited, and does not sanction as much judicial inquiry into the justification for an agency's conclusions.

Although this standard of review has been endorsed within the District of Columbia Circuit[3], neither the district court nor the circuit court followed it in the instant case. Instead, as will be more fully explained *infra,* the Court of Appeals employed the "rule of reason" as the standard of review, and proceeded to set out in advance the factual criteria to be used by an agency

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[2] Other circuit courts in which the "arbitrary and capricious" standard has been applied to NEPA cases include the Seventh, in *Nucleus of Chicago Homeowners Ass'n v. Lynn,* 524 F.2d 225, 229 (7th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976); and the Fourth, in *Coalition for Responsible Regional Development v. Coleman,* 555 F.2d 398 (4th Cir. 1977).

[3] *Concerned About Trident v. Schlesinger,* 400 F. Supp. 454, 487 (D.D.C. 1975), *remanded on other grounds,* 555 F.2d 817 (D.C. Cir. 1977).

in determining whether an EIS is required. Such variation from the scope of review set out in the APA is improper. *Cf. Kleppe v. Sierra Club, supra,* and *Vermont Yankee, supra.*

In *Vermont Yankee,* a case involving the interface of NEPA and the APA in agency rulemaking, this Court

> emphasized that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act. [Citation omitted.] Thus, it is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA. *Vermont Yankee,* ____ U.S. at____, 98 S. Ct. at 1214.

The administrative decision in this case involves neither rulemaking nor adjudication, and review should be had under the provisions of Section 706(2)(A), as was done in *Citizens to Preserve Overton Park, Inc., supra.* This standard appears to have been sanctioned by this Court in *Kleppe v. Sierra Club,* 427 U.S. at 412, where it stated in regard to the refusal to file a regional EIS that "absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately."

B. The Court of Appeals' Application of the "Rule of Reason" as a Standard of Review Is Unwarranted

As indicated *supra,* the Court of Appeals did not clearly set forth the standard of review it applied to the agency's determination that no EIS was necessary in connection with the budget proposal in this case. Indeed, the Court of Appeals in its decision on the status of agency budget proposals to OMB under NEPA has formulated yet another "balancing test" of the sort which was struck down in *Kleppe v. Sierra Club, supra.* In that case, this Court emphatically rejected the substitution of "court-devised" factors for the clear instruction of the APA.

In determining that only certain types of budget proposals are to be considered "proposals" within the meaning of NEPA,

the Court of Appeals relied upon several cases which had applied a "rule of reason" in challenges to the *adequacy* of an EIS. In doing so, the court failed to distinguish the process of statutorily interpreting NEPA from the process of reviewing an agency's implementation thereof.

The particular "rule of reason" as applied to review of the sufficiency of an EIS has found substantial support in the various circuit courts. It is a test designed to confine EIS contents to the realm of the "reasonable", thus insulating them to some degree from attack based on alleged agency failure to consider the most remote of possibilities. This rule thus prevents the misuse of NEPA "as a crutch for chronic fault-finding." *Life of the Land v. Brinegar,* 485 F.2d 460, 472 (9th Cir. 1973).

> This standard has been described as requiring courts to
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> "recognize 'on the one hand that the Act mandates that no agency limit its environmental activity by the use of an artificial framework and on the other that the act does not intend to impose an impossible standard on the agency.' The court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors . . . (footnotes omitted)." *Sierra Club v. Froehlke,* 534 F.2d 1289, 1300 (8th Cir. 1976) *quoting from Sierra Club v. Morton,* 510 F.2d 813, 818-19 (5th Cir. 1975).

To this end, "a reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS." *Trout Unlimited v. Morton,* 509 F.2d at 1283.

The most recent endorsement of this "rule of reason" within the District of Columbia Circuit was in *Natural Resources Defense Council, Inc. v. Administrator, Energy Research and Development Administration,* 451 F. Supp. 1245 (D.D.C.

1978). The court's comments on the soundness of the rule included the following:

> While the *Vermont Yankee* decision reversed the Court of Appeals' particular *application* of NEPA's "rule of reason" in *Aeschliman v. United States Nuclear Regulatory Commission,* 178 U.S.App.D.C. 325, 547 F.2d 622 (1976), the Supreme Court's decision in no way undermines, and in fact affirms, the appropriateness of the "rule of reason" as the basis for assessing agency compliance with Section 102(2)(C) of NEPA. *Id.* at 1261 (footnote omitted; emphasis in original).

In the instant case, the Court of Appeals is expanding the concept of the rule of reason from a criterion to be employed in determining whether the content of an EIS is sufficient to a standard of review to be applied in determining the *meaning of the statute.* By expanding its applicability to include decisions of what *types* of proposals must be accompanied by an EIS, the Court of Appeals has formulated a new standard of review which does not comport with the "arbitrary and capricious" standard of the APA. The court's justification for the adoption of such a rule clearly indicates this result. As stated by the court:

> There is a danger of overburdening NEPA by spreading its mandate too widely. The environmental analysis required by NEPA is governed by the rule of reason, as we have held *in determining the scope of realistic alternatives to the proposed action and the intensity of the required analysis.* A rule requiring preparation of an EIS on the annual budget request for virtually every ongoing program would trivialize NEPA. In our view, section 102(2)(C) contemplates a "proposal" for taking new action which significantly changes the status quo, not for a routine request for budget approval and appropriations for continuance and management of an ongoing program.

> We hasten to add the qualification that NEPA may have application to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. *The need is for a reading of NEPA that harmonizes its words, its purposes, and the rule of reason.* Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review. A review of such a nature reflects *choices* that should under NEPA be made in the light of a full consideration of pertinent environmental consequences and alternatives. *Sierra Club v. Andrus,* 581 F.2d 895, 903 (D.C. Cir. 1978) (footnotes omitted; emphasis added).

Although the court is properly concerned with "overburdening NEPA", it is not the province of the judiciary to usurp the role of Congress by developing criteria to determine the scope of the burdens imposed by statute. *Cf. Tennessee Valley Authority v. Hill,* ___ U.S. ___, 98 S. Ct. 2279 (1978). The court, in attempting to limit NEPA "burdens", devised its own standards for determining which types of budget proposals are "proposals" within the meaning of the statute. In so doing, the court has devised a test which sanctions judicial involvement and intrusion into the ongoing budget-making process to determine whether the "proposal" in question will change the status quo (a factual determination) or whether a "new look" (a factual determination) is being had at the agency's overall program.[4] As Judge MacKinnon noted in his dissent,

> the opinion has attempted to rely on a flexible "rule of reason" approach, rather than heeding the straightforward words of NEPA.... *Sierra Club v. Andrus,* 581 F.2d at 906.

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[4] *Sierra Club v. Andrus,* 581 F.2d 895, 903-04 (D.C. Cir. 1978).

This "flexible approach" is analogous to the "balancing test" which was disapproved in *Kleppe v. Sierra Club,* 427 U.S. at 404-06, and the same rationale given there militates against sanctioning such a rule in this case:

> The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.* Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation. As the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action, it may be assumed that the balancing process devised by the Court of Appeals also would result in the preparation of a good many unnecessary impact statements. *Id.* at 406 (emphasis in original).

In conclusion, the rule adopted by the court is sure to result in agency uncertainty as to when NEPA responsibilities are triggered. A rule as vague in its applicability as the one the Court of Appeals has adopted is particularly inappropriate for review of agency programs which require great flexibility, such as the budget-making process involved here. For this reason, the Court of Appeals' rule should be overturned, since the scope of review it applies is greater than that contemplated by 5 U.S.C. § 706(2)(A) of the APA.

II

RESPONDENTS LACK STANDING TO CONTEST OMB'S FAILURE TO FULFILL ITS ALLEGED NEPA OBLIGATIONS IN CONNECTION WITH THE BUDGET PROCESS

It has been well established that standing to sue is an essential element of a cause of action and must be demonstrated as well as alleged. *Sierra Club v. Morton,* 405 U.S. 727 (1972). Under the standing requirements established by *Data Processing Service v. Camp,* 397 U.S. 150 (1970), and *Barlow v. Collins,* 397 U.S. 159 (1970), a plaintiff must allege 1) that the challenged agency action has caused him "injury in fact", and 2) that the injury was to an interest arguably within the "zone of interests" to be protected by NEPA. Since "NEPA was formulated to protect conservational, environmental, and aesthetic interests", *Cummington Preservation Committee v. FAA,* 8 ERC 1121, 1123 (D. Mass. 1975), there seems to be little possible dispute over the "zone of interests" requirement.

However, the fact "[t]hat plaintiff's interests are cognizable generally under NEPA ... does not compel the determination that it has sustained an injury in fact sufficient to maintain this action." *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. 762, 766 (D.D.C. 1977). It is extremely difficult to perceive how OMB's failure to develop NEPA procedures for use during the budget process has caused any harm at all to respondents.

> [T]he issue at this point devolves on the nature of the injury in fact required under NEPA: May the injury derive solely from the submission of legislative proposals without an adequate EIS, and the concomitant denial of participation in the process of compiling an EIS, or must it comprise a more immediate, less speculative threat to the interests of the plaintiff? *Id.*

Three recent cases decided in the District and Circuit Courts for the District of Columbia have dealt with the concreteness of the injury necessary to sustain standing for plaintiffs who are alleging harm from the ongoing legislative process. All three decisions[5] have found the injury to be too speculative and the possibility of redress too indirect to provide standing. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976).

Foremost among these cases is *Harrington v. Bush,* 553 F.2d 190 (D.C. Cir. 1977), in which the plaintiff, a member of the House of Representatives, sought both a declaratory judgment that certain activities of the Central Intelligence Agency (CIA) were illegal and an injunction prohibiting the CIA from using its appropriations in furtherance of the allegedly illegal activities. The Court of Appeals held that the plaintiff lacked standing. It stated that in cases involving challenges to an Executive function, there is a

> need for a *very clear* showing of concrete, personal injury ... so that federal courts will not be thrust into the role of "continuing monitors of wisdom and soundness of Executive action...." (Emphasis in original). *Harrington v. Bush, id.* at 215, *quoting from Laird v. Tatum,* 408 U.S. 1, 15 (1972).

The other two cases have dealt with the precise issue involved in this case: whether the submission of a legislative proposal without an adequate EIS,[6] or any EIS at all,[7] was an injury to plaintiffs' interests sufficient enough to provide the necessary element of concreteness to support standing.

In the first case, the court held that transmittal by the Secretary of the Interior to Congress of a recommendation

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[5] *Harrington v. Bush,* 553 F.2d 190 (D.C. Cir. 1977); *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. 762 (D.D.C. 1977); *Wingfield v. OMB,* 9 ERC 1961 (D.D.C. 1977).

[6] *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. 762, 764 (D.D.C. 1977).

[7] *Wingfield v. OMB,* 9 ERC 1961 (D.D.C. 1977).

accompanied by an insufficient EIS did not constitute an injury in fact to the plaintiff's interests. The effect of the proposals

> on the contents of any subsequent legislation and the date of the ultimate enactment of such legislation [is] speculative to say the least. *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. at 766.

In *Wingfield v. OMB,* 9 ERC 1961 (D.D.C. 1977), an individual sought to compel several government agencies to include EISs in their reports and recommendations to Congress concerning strip-mining proposals. The court held

> that the injury here is too speculative and remote to support standing. The injury here would occur only if the House accepts CEQ's recommendations, the Senate accepts them as well and that the legislative package as finally passed by both Houses is signed into law by the President. *Id.* at 1963.

An even greater degree of speculative injury is present in the case before this Court, since the proposals in question are subject to substantial revision by OMB, the President, and both Houses of Congress before they are finally signed into law. In light of the uncertain nature and degree of injury, and the possibly crippling effects of similar lawsuits on the ability of agencies to fulfill their duties, this Court should hold that respondents lack standing.

CONCLUSION

The Court of Appeals' use of the "rule of reason" as a standard of review in statutory interpretation of NEPA is incorrect. By attempting to engraft a rule previously used only in testing the adequacy of an EIS onto the law governing reviewability of an agency's threshold determination of whether or not to prepare an EIS, the court has succeeded only in compounding the confusion which already prevails in this area of the law. In agency programs which demand flexibility, such as the budget-making process, there is no justification for a standard of review which allows courts to effectively hamstring agency actions. What is needed is a consistently applied standard which minimizes judicial interference and disruption of agency programs, and allows agencies the needed degree of flexibility to carry out their statutory mandates. There can be no certainty as to what is required of agencies in fulfilling NEPA obligations as long as the standards of review applied by the various courts differ so widely.

For the reasons stated above, Pacific Legal Foundation urges the Court to reverse the decision of the Court of Appeals, and establish a uniform national standard of review under the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A). Such a standard will best serve the public interest by promoting

the congressional policy expressed in NEPA and by alleviating the confusing and conflicting requirements imposed on administrative agencies under the current state of the law.

Respectfully submitted,

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Petitioners

v.

SIERRA CLUB, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE WILDERNESS SOCIETY AS AMICUS CURIAE

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, Secretary of the Interior, and JAMES T. McINTYRE, JR., Director, Office of Management and Budget,
Petitioners

v.

SIERRA CLUB, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE WILDERNESS SOCIETY AS AMICUS CURIAE

INTEREST OF AMICUS *

The Wilderness Society ("the Society") is a tax-exempt nation-wide nonprofit conservation organization. Its members, numbering over 70,000, frequently use national park lands, wildlife refuges, lands managed by the Bureau of Land Management, and Congressionally desig-

* Pursuant to Supreme Court Rule 42, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters manifesting such consent have been filed with the Clerk of the Court.

nated wilderness areas for recreational purposes. During the 41 years of its existence, the Wilderness Society has worked to secure the preservation of original wilderness areas in the United States and to educate the public to the values and uses of wilderness as a national natural resource. To these ends, the Society publishes a quarterly journal, engages in field activities to discover and monitor the condition of wilderness areas, and provides testimony and information concerning wilderness and related issues to legislative bodies, including the Congress. The Society also participates in rulemaking and adjudicatory proceedings before federal agencies and frequently participates in litigation of environmental issues in the Federal courts.

Wilderness areas provide an opportunity for thousands of Americans to enjoy the unique solitude and splendor of an environment untouched by civilization, while at the same time affording havens for wildlife and for plant life and ecosystems to develop and be studied in their natural condition. Wilderness is by definition among the most fragile of our Nation's resources—easy to lose but requiring centuries to rebuild. The National Environmental Policy Act of 1969 (NEPA) is thus of critical importance in assuring that federal decisions affecting the ever-diminishing areas of true wilderness are made with full awareness of the environmental values that hang in the balance.

NEPA represents a major congressional commitment to enhancing the quality of the nation's environment. The chief means chosen to enforce this substantive commitment is the procedural requirement of § 102(2)(C) of the Act, 42 U.S.C. § 4332(2)(C), which directs all federal agencies "to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a written statement describing the

environmental impact of the proposed action and alternatives to it. A vitally important question presented in this case is whether an agency's budget request reflecting a marked change in funding or reevaluation of policy on environmentally significant programs is a "recommendation on proposals for legislation [or] other major Federal actions significantly affecting" the environment so as to require the preparation of an environmental impact statement.

Resolution of this issue will determine whether (and to what extent) Federal decisions concerning the funding of programs of major environmental significance will receive the benefit of the informed analysis and considered judgment contemplated by NEPA. As we will demonstrate below, any attempt totally to exclude agency funding requests from the reach of § 102(2)(C) flies in the face of the plain language of that section and NEPA's policy mandating informed decision-making regarding the environmental consequences of federal action. The government's extreme position, based as it is largely on purported administrative convenience, prompts this amicus brief.

QUESTIONS PRESENTED

The government's statement of the first issue does not fairly characterize the question presented by the Court of Appeals' holding. The Court of Appeals did not hold that all annual budget requests for existing federal programs affecting the environment must be accompanied by an environmental impact statement (EIS). Indeed, it reversed the District Court's holding to that effect and concluded that § 102(2)(C) required an EIS only when an agency's budget proposes a significant change in the status quo or "ushers in a considered programmatic course following a programmatic review" of ongoing programs. *Sierra Club* v. *Andrus*, 581 F.2d 895, 903 (D.C. Cir.

1978).[1] Thus, the question presented here is whether an agency's budget request proposing a significant change in the status quo or reflecting a reevaluation of policy on environmentally significant programs is a "proposal[] for legislation [or] other major Federal action[]" that must be accompanied by an EIS.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under NEPA, an EIS is required for any agency proposal for legislation or other major federal action significantly affecting the environment. 42 U.S.C. § 4332 (2) (C)[3]. An agency's budget request that would substantially change funding of environmentally significant programs or reflect a reevaluation of Department policy regarding such programs is a "proposal" for "major Federal action" within the meaning of this section. Such a request therefore must be accompanied by an EIS.

I. An agency's request to the Office of Management and Budget ("OMB") for an annual budget is a "proposal" within the meaning of NEPA. To hold otherwise is contrary to NEPA's plain language and would vitiate the Act's undoubted purpose of requiring serious consideration of environmental consequences prior to the final stages of agency decision-making. The government's emphasis on the agency's inability to make final budget decisions is misplaced, since NEPA and this Court's interpretation of it require that a mere *proposal* for action be accompanied by an EIS.

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[1] Given the limited scope of the Court of Appeals holding, the absence of any significant conflict in the circuits on the question presented, and the change in applicable regulation that has occurred since the decision below, see Part II, *infra*, the Court may wish to consider either dismissing the writ of certiorari as improvidently granted or remanding the case to the Court of Appeals for it to consider the effect of the intervening change in regulation. See *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162-66, 95 S. Ct. 1504, 1522-23 (1975).

[2] This amicus Brief addresses only the first question raised in the petition for certiorari. The Wilderness Society does not address the second question on which this Court granted certiorari: whether the Court of Appeals correctly upheld the District Court's declaratory judgment requiring that OMB prepare regulations to assist other agencies in determining when an EIS is required. While amicus agrees with Respondents that OMB is for some purposes an "agency" within the meaning of NEPA, whether OMB, CEQ or the agencies themselves promulgate regulations relating to the circumstances under which a budget request must be accompanied by an EIS is of less importance to the Wilderness Society than that the obligation be recognized and fulfilled.

[3] Section 102(2)(c), 42 U.S.C. § 4332, provides as follows:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes[.]

Where an agency's budget proposes marked changes in funding or policy for environmentally significant programs, the proposal is one for "major Federal action." Under the applicable caselaw and regulations, a federal agency's decision substantially to shift resources or revise its programs with the purpose or effect of significantly affecting the environment is a "proposal for major Federal action" and must be accompanied by an environmental impact statement.

II. The new Council on Environmental Quality ("CEQ") regulation excluding appropriations from the definition of "legislation" is entitled to no deference from this Court on the issue of statutory interpretation. While generally CEQ's Guidelines and Regulations are entitled to substantial deference, the CEQ's contradiction of its prior contemporaneous and longstanding interpretation, the unusual circumstances of the promulgation of this regulation, and the inadequacy of the reasons given by CEQ in support of the change deprive this new interpretation of the respect it might otherwise command.

III. The limited EIS requirement enunciated by the Court of Appeals will neither disrupt the budget process nor invade the province of other branches of government. The requirements of § 102(2)(C) are to be reasonably construed in the context of the particular governmental decision process involved. CEQ's new regulations themselves manifest the flexibility attainable under NEPA, providing for a streamlined impact statement procedure for drafts accompanying legislative proposals and permitting the nondisclosure to the public of material warranting confidential treatment. To the extent that an appropriation EIS contained material exempt from public disclosure, NEPA itself contemplates that it may be withheld from disclosure. Finally, preparation of the EIS itself entails no restriction on the President's ability to receive advice from his Cabinet.

IV. NEPA's policy of assuring that major federal decisions be informed with a consideration of any significant environmental consequences would be seriously frustrated by affording the budgetary process a blanket exemption from NEPA. While agency budget submissions currently may not be oriented towards their environmental consequences, this does not excuse judicial enforcement of the clear NEPA mandate that all levels of federal decision-making reflect consideration of such factors. The courts' proper constitutional role is to enforce the statute as written. Agencies must look to Congress, not the courts, to rewrite the statute.

ARGUMENT

I. Appropriations Requests May Be Proposals On Major Federal Actions Requiring An Environmental Impact Statement.

As indicated above, an environmental impact statement must be prepared whenever an agency makes a report or recommendation on a proposal for legislation or other major federal action significantly affecting the environment. There is no dispute that an agency's budget request is a "recommendation" or that the programs at issue "significantly affect" the environment. The controversy focuses instead on whether a budget request is a "proposal" for either "legislation" or "major Federal action." As we will demonstrate, an agency's budget request is a "proposal" that, in some instances, is for "major Federal action" within the meaning of § 102(2)(C).

A. *Appropriations Requests Are Proposals.*

Under any common sense meaning of the word "proposal" used in § 102(2)(C), an agency's request for a budget is a "proposal." The budget request is a concrete and detailed plan which the agency, as its proponent, "present[s] for acceptance or rejection" to OMB and to

the President. *See* Webster's New World Dictionary at 1140. This interpretation of the word "proposal" is supported by NEPA's statutory purpose.

As numerous courts have recognized, the primary purpose of NEPA is to require federal agencies, before making final decisions or recommendations, carefully to consider the impact of these decisions from an environmental perspective. *See, e.g. Lathan* v. *Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc); *County of Suffolk* v. *Sec'y of Interior*, 562 F.2d 1368, 1375, 1380 (2d Cir. 1977); *City of Boston* v. *Volpe*, 464 F.2d 254, 257 (1st Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc.* v. *A.E.C.*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). Thus, under § 102(2)(C), an environmental impact statement is required prior to any final decision, whenever an agency recommends or reports on a proposal for legislation or other major federal action. This requirement is designed to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . . The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences and take actions that protect, restore and enhance the environment." Council on Environmental Quality, Rules & Regulations, 43 Fed. Reg. 55978, 55990-91, § 1500.1(b), (c) (Nov. 1978) ["CEQ Regulations"]. The CEQ Guidelines similarly recognize that NEPA "require[s] agencies to build into their decision process . . . at the earliest possible point . . . careful consideration of the environmental aspects of the proposed action. . . ." 40 C.F.R. § 1500.1(a) ["CEQ Guidelines"].

In the important and difficult process of preparing a national budget, an agency's assessment of the environmental consequences of significant changes in funding for its ongoing environmental programs will provide assistance not only to Congressional decision-makers, but

to OMB and the President as well. Given the enormous responsibilities and power of OMB, and its relatively small staff, NEPA's fundamental purpose—ensuring that all federal agencies and officials undertake decision-making with a view toward "reversing the deterioration of the country's environment," *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 693, 93 S.Ct. 2405, 2419 (1973)—demands that OMB receive the kind of analysis contemplated by § 102(2)(C), lest important environmental considerations be "shunted aside in the bureaucratic shuffle" of annual budget making. *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787, 96 S.Ct. 2430, 2538 (1976).

The heart of the government's legal argument rests on its assertion that an agency's budget request to OMB is not a "proposal" under § 102(2)(C) because (1) only the President has authority to submit appropriations requests to Congress under the Budget and Accounting Act, and (2) the agency's ability following its budget submission to OMB to negotiate further with OMB or the President deprives its initial OMB submission of the requisite characteristics of a proposal. These arguments fundamentally misconceive the meaning and purpose of NEPA.

The government's argument would deprive NEPA of its intended ability to ensure that federal decision-makers—including the President and Congress, *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972)—be aware of the environmental consequences of their decisions *before* they become final.[4] *City of Boston* v. *Volpe, supra*, 464 F.2d at 259 (NEPA is con-

[4] The government's argument is also inconsistent with its recognition that the "crucial term 'proposals'" cannot be read out of the Act, "for the obvious reason that the Act was intended to bring environmental considerations into play *before* the action was taken." Brief for the United States at 46 n.34.

cerned with "proposed action, not fait accompli"); *Jones* v. *District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 510-511 (D.C. Cir. 1974). Congress intended no such result, as is apparent on the face of § 102(2)(C), which specifically directs that EISs be submitted to the President and, as the government recognizes, Brief for the United States at 32 n.26, requires preparation of an EIS where an agency proposes "substantive" legislation. Thus, even though Congress alone makes final decisions on legislative proposals (and, in doing so, may consider other proposals not required to be accompanied by an EIS), Congress clearly wished to benefit in its own decision-making from the agency's expert environmental analyses.[5] *NRDC* v. *Morton*, *supra*, 458 F.2d at 833 & nn.11, 12. *See also*, *Vermont Yankee Nuclear Power* v. *Natural Resources Defense Council*, 98 S.Ct. 1197, 1207, 1219 (1978). As the D.C. Circuit held in analogous circumstances, "it is precisely because [one agency] has the power to modify [another agency's] proposals that impact statements accompanying the proposals are necessary. [The] decision on whether to approve the proposals as presented or to modify them may be, and should be, vitally affected by the information contained and the conclusions drawn in [the] impact statement." *Jones* v. *D. C. Redevelopment Land Agency*, *supra*, 499 F.2d at 511.

The government seems to confuse NEPA's requirement that a "proposal" be accompanied by an EIS with the *finality* requirement for judicial review of agency actions more generally embodied in the Administrative Procedure Act, Brief for the United States at 30-31, n.20. NEPA is directed at consideration of environmental issues, not to

[5] Moreover, the statutory requirement that an EIS "accompany the proposal through the existing agency review processes" necessarily contemplates that EISs may be prepared by agencies that lack final authority over the proposal in question. 42 U.S.C. § 4332 (2)(C)

other aspects of agency action. As this Court observed in *Aberdeen & Rockfish R.R. Co.* v. *S.C.R.A.P.*, 422 U.S. 289, 320, 95 S.Ct. 2336, 2355 (1975), "[w]hen agency or departmental consideration of environmental factors in connection with [major federal actions] is complete, notions of finality . . . do not stand in the way of judicial review of the adequacy of such consideration," even though other aspects of the underlying federal action are not or may never be ripe for review. Neither Respondents nor amici seek to require judicial review of an agency's requested budget; rather, they seek to enforce the independent duty that NEPA imposes to produce an EIS to accompany certain budget requests.[6] That duty clearly arises prior to any final decision, and an agency's compliance with this obligation is just as clearly subject to judicial review.

Nor does *Kleppe* v. *Sierra Club*, 427 U.S 390, 96 S.Ct. 2718 (1976), sustain the government's position that no "proposal" is involved here. The District Court in *Kleppe* expressly found that "there was no existing or proposed plan or program on the part of the Federal Government for the regional development of the area described in respondents' complaint," 421 U.S. at 401, 96 S.Ct. at 2726, and this finding was accepted by the Court of Appeals and the Supreme Court. Thus, the issue in *Kleppe* was whether, *prior* to the time that a proposal came into existence, NEPA imposed a judicially enforceable duty to commence preparing an EIS.

[6] Accordingly, the analogy the Government draws, Brief for the United States at 30-31 n.20, to *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112, 68 S. Ct. 431, 436-37 (1948) is not apt. The Court there held that the CAB's orders granting certificates for overseas air transport were not judicially reviewable because such orders were not final without Presidential approval, and that the President's decision was not reviewable because it was a political decision wholly committed to his executive discretion. While *Chicago & Southern* might be relevant if Respondents sought judicial review of the agency's budget request itself or of the President's action with respect thereto, the case is irrelevant to the issues presented here.

Here, by contrast, there is no disagreement that a proposed budget for the Fish & Wildlife Service was in existence and had been submitted by the Department of the Interior to OMB. No guesswork is required to decide whether the agency *would* submit a budget; no "germination" of an idea whose time might never come is involved. *Cf. Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406, 96 S.Ct. at 2728. The Fish & Wildlife Service's proposed budget was far more than a mere "contemplation" in the agency's decision-making process. *Ibid.* It was a proposal to which the agency was committed as its recommendation for its own budget. While subject to final approval by others, it "define[d] fairly precisely the scope and limits" of proposed agency action, and thus afforded the "factual predicate for the production of an [EIS]." *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 402, 96 S.Ct. at 2726-27.

In short, the agency's "formal recommendation or report" on the proposed budget, *cf.* Brief for the United States at 31 n.21, occurs at the time of submission to OMB. An EIS must be prepared at that time if the budget request proposes either "legislation" or "other major Federal action."

B. *Appropriations Requests Which Would Substantially Change Funding or Policy On Environmentally Significant Programs Constitute "Proposals for Major Federal Action."*

The Society agrees with Respondents and the other amici that appropriations requests are "proposals for legislation." In the interests of brevity the Society will confine its argument to whether these "proposals" also are "proposals for major Federal action" so as to require an EIS.[7]

[7] The question presented to both courts below was whether budget requests are "proposals for legislation and other major Federal actions" within the meaning of § 102(2)(C). As Judge MacKinnon recognized in his separate opinion, regardless of whether a request for appropriations is a proposal for "legislation," if it is a proposal for "major Federal action" an EIS may be required. 581 F.2d at 914. Although Judge Leventhal's opinion for the court did not directly address the "major Federal action" language of the statute, the District Court ruled in favor of Respondents on this point, *Sierra Club* v. *Morton*, 395 F. Supp. 1187, 1189 (D.D.C. 1975). Since the judgment below could be sustained on this ground without expanding the relief granted, *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 1156-57 (1970), the Court may appropriately consider whether agency appropriations requests to OMB reflecting major funding or policy changes for environmentally significant and previously authorized programs are "proposals for . . . major Federal actions."

The reasoning of the Court of Appeals would require preparation of an EIS when a federal agency's budget request to OMB proposes substantially to change funding of authorized programs so as to significantly alter their impact on the environment.[8] This is in accord with Congress' clear intent, expressed in the legislative history, that the phrase "major Federal actions" includes "expansion or revision of ongoing programs" that would significantly affect the environment. S.Rep. No. 91-296, 91st Cong., 1st Sess. (1969) at 20. As the District Court noted, budget decisions have a direct and substantial bearing on the staffing, management and maintenance of federal environmental programs. In fact, the environmental consequences of a drastic cut-back in federal resources allocated to such previously authorized programs as wildlife refuge management or federal park land acquisitions can have

[8] See 581 F.2d at 902-03 (routine requests for appropriations distinguished from new action which significantly changes the status quo). Although the Court of Appeals' analysis focused on whether there was a proposal for "legislation," its two-pronged standard for determining when an appropriations EIS is required is equally if not more useful in approaching the question of whether such a proposal is for "major Federal action." The Wilderness Society will concentrate on the proposition that a major change in funding for environmentally significant programs is a "major Federal action," and adopts Respondents' argument that an EIS is also required to accompany a budget request reflecting a considered reevaluation of policy ushering in a programmatic course.

more devastating environmental consequences than the more limited federal construction projects for which EISs have been required.[9]

The government suggests that the environmental consequences of an agency's budgetary decisions can be considered upon preparation of an EIS when budget decisions are "implemented." But such delayed consideration of environmental factors undermines the predecisional thrust of NEPA, for if the money has not been appropriated, the decision may be effectively foreclosed. As Judge MacKinnon recognized, "[w]hen . . . a decision is made to request no funding at all, thus terminating a program . . . such action could plausibly be considered 'major.'" 581 F.2d at 914. The record in this case reflects that the Department of the Interior *contemplated* a severe retrenchment of federal operation and maintenance of wildlife refuges.[10] Had that "contemplation" ripened into a budget request that failed to seek appropriations sufficient for such an authorized and existing program, and had that agency's proposal been adopted,[11] the preclusionary effect at the "implementation" stage (when the government states that an EIS *would* be required) would render the NEPA process a mockery.

[9] *See, e.g., Businessmen* v. *D.C. Council*, 339 F. Supp. 793 (D.D.C. 1972) (urban renewal project); *Environmental Defense Fund* v. *Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971) (a canal); *Environmental Defense Fund* v. *Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971) (a dam).

[10] Plaintiffs' Statement of Material Facts as to Which There Is No Genuine Issue, at 5-6. The importance of full consideration of environmental consequences prior to the agency's budget submission to OMB is highlighted by the fact that these submissions "resemble very closely in nature and form the Justifications for Appropriations which are ultimately sent to Congress for each Bureau and agency." Affidavit of Curtis Bohlen, Deputy Asst. Secretary of Interior for Fish and Wildlife and Parks at 3.

[11] It bears emphasizing that, once a concrete proposal for major federal action significantly affecting the environment is made, the possibility that the proposal will not become effective or will be altered does not detract from its characteristics as a proposal or eliminate the need for compliance with Section 102(2)(C). NEPA necessarily contemplates that some federal proposals will, on consideration of the EIS and comments thereto, be changed or abandoned. *See, Jones* v. *D.C. Redevelopment Land Agency*, 499 F.2d 502, 510-11 (D.C. Cir. 1974). *See also*, 6 CEQ Ann. Rep. 628-32 (1975).

The requirement of an EIS where budget requests reflect significant changes in funding or policy for ongoing programs is not the product of an over-active judicial imagination, as the government suggests, but rather soundly reflects well-established principles drawn directly from NEPA and used by courts and agencies alike to identify "major Federal actions." Thus, for example, it has been held that the Federal Aviation Administration's acquiescence in an expanded use of National Airport, in part by including in its budget request for FY 1972 some $26 million for modernization, constituted "major Federal action" significantly affecting the environment within the meaning of § 102(2)(C) and thus an EIS was required. *Virginians for Dulles* v. *Volpe*, 541 F.2d 442, 445 (4th Cir. 1976). The court explained that the "increased use will have a significant impact on the environment whether existing facilities are retained unchanged or modified," *id.* at 445, and after analyzing the legislative history, concluded that

> Congress wanted the agencies to address environmental consequences not only in considering future projects but also in reviewing their present policies and programs, at least when expanding or revising them.

Virginians for Dulles v. *Volpe*, *supra*, 541 F.2d at 446. *See also, Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1319, 1322 (8th Cir. 1974) (en banc). The holding below also is supported by CEQ's new regulations which define "major Federal action" to

include "new and continuing activities . . . and *connected agency decisions allocating agency resources* to implement a specific statutory program or executive directive." § 1508.18(a), (b)(3) (emphasis added).

The Court of Appeals' standard is quite properly couched in terms sufficiently flexible to match the broad scope of § 102(2)(C), which reflects NEPA's purpose to reach all proposed major federal action, of whatever form, that can have a significant effect on the environment. *See, Scientists' Inst. for Public Information, Inc.* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973). Whenever a contemplated new policy or major change in the funding of environmentally significant federal programs crystallizes into an agency budget "proposal," it must receive the internal NEPA review assured through the EIS. *See Kleppe* v. *Sierra Club*, *supra*. The Court of Appeals' standard requires no more.

II. CEQ's New Regulation Excluding "Appropriation" From the Reach of § 102(2)(C) Is Entitled To No Deference.

While NEPA imposes particular obligations on all federal agencies, CEQ is the body expressly created by NEPA to coordinate and assist the other federal agencies' efforts in implementing and promoting the purposes of the Act.[12] Pursuant to NEPA and the specific directive of Executive Order 11514, CEQ promulgated Guidelines for all federal departments, agencies, and establishments for use in preparing EISs. 36 Fed. Reg. 7724, § 1 (April 23, 1971). The current CEQ Guidelines, in effect until June 1979, date back to 1973 and specifically provide that "[t]ypes of actions covered by the Act . . . include

[12] *See* 42 U.S.C. § 4343 (creating CEQ), § 4332(2)(B) (all agencies to consult with CEQ), § 4332(2)(C) (all EISs to be filed with CEQ), and § 4332(2)(H) (all federal agencies to assist CEQ). See also CEQ Guidelines, 40 C.F.R. § 1500.1(b).

. . . [r]ecommendations or favorable reports relating to legislation *including requests for appropriations.*" 40 C.F.R. § 1500.5(a)(1) (emphasis added). Similar provisions are found in all earlier versions of the guidelines issued by CEQ. *See* 36 Fed. Reg. 7724 (1971).

This contemporaneous and long-standing interpretation of the statute by the agency primarily charged with its administration would normally be entitled to "great deference" by a court called on to construe the statute. *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801 (1965).[13] As this Court reiterated last Term, "an administrative 'practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and

[13] CEQ's articulation of this interpretation in its Guidelines, rather than in material denoted as a "rule or regulation," does not deprive it of significance, *see, General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1977), particularly in view of the Guidelines' contemporaneous adoption and the fact that every federal court to consider the question has agreed with the Guidelines' position. *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972), *aff'g.* 339 F. Supp. 806 (E.D. Tenn. 1972); *Aluli* v. *Brown*, 437 F. Supp. 602 (D. Hawaii, 1977); *Sierra Club* v. *Froehlke*, 359 F. Supp. 1289, 1361 (S.D. Tex. 1973), *modified on other grounds*, 499 F.2d 982 (5th Cir. 1974). CEQ's position has been that its Guidelines were binding on all federal agencies, see 43 Fed. Reg. 55,978 (Nov. 29 1978), and numerous lower courts have held that the Guidelines are entitled to substantial deference in interpreting the statute. *See, e.g., Carolina Action* v. *Simon*, 389 F. Supp. 1244, 1246-47 (M.D.N.C.), *aff'd*, 522 F.2d 295 (4th Cir. 1975); *Appalachian Mountain Club* v. *Brinegar*, 394 F. Supp. 105, 120 (D.N.H. 1975). This Court itself has looked to CEQ's Guidelines for guidance on other issues relating to an agency's compliance with NEPA. *See, Vermont Yankee Nuclear Power* v. *NRDC*, 98 S. Ct. 1197, 1216 (1978). Finally, this particular guideline was adopted as a regulation by other federal agencies including the Department of Interior, *see* Department of Interior Manual § 516.5, 36 Fed. Reg. 19344 (Oct. 2, 1971).

new.' *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358 (1933)." *Zenith Radio Corp.* v. *United States*, 98 S.Ct. 2441, 2445 (1978).

While recognizing this general rule of reliance on agency interpretation as an aid to construction, the government asks this Court to ignore this contemporaneous construction of eight years' standing in favor of a new and directly contrary agency position first proposed after the Court of Appeals decision in this case and issued as a final rule only after the petition for certiorari was filed in this Court. Although the Society agrees that CEQ's interpretations of NEPA generally are entitled to substantial deference on questions of statutory construction, the circumstances surrounding this particular interpretation suggest that it should be disregarded by the Court.

The deference ordinarily accorded to an agency's interpretation of the statute it administers is more limited when the agency takes a position inconsistent with its prior and more contemporaneous interpretation. *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86, 93-94, 94 S.Ct. 334, 339 (1973). Indeed, the courts have frequently "declined to follow administrative guidelines . . . where they conflicted with earlier pronouncements of the agency. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-59, n.25, 95 S.Ct. 2051, 2063-64 (1975)," *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411 (1976). *See generally, Sanford's Estate* v. *C.I.R.*, 308 U.S. 39, 60 S.Ct. 51 (1939). The government seeks to justify CEQ's about-face as a reasoned exercise of administrative discretion prompted by "'new developments or [a] reconsideration of the relevant facts and its mandate.'" Brief for the United States at 44, *quoting from American Trucking Association* v. *Atchison, Topeka & Santa Fe Railway*, 387 U.S.

397, 416 (1967).[14] As *ATA*, and the other cases relied on by the government make clear, however, "an agency changing its course must supply a reasoned analysis," *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971). *See, Skidmore* v. *Swift Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944). That reasoned analysis is completely lacking in this instance.

CEQ's "Janus-like" about-face, *Vermont Yankee Nuclear Power* v. *NRDC*, *supra*, 98 S.Ct. at 1209 n.15, was first signalled in proposed regulations published June 9, 1978, three weeks after the Court of Appeals' decision. The commentary to the proposed regulations did not even

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[14] Neither *American Trucking Association, supra,* nor *Automobile Club* v. *C.I.R.*, 353 U.S. 180, 77 S. Ct. 707 (1957), the two Supreme Court cases cited in Brief for the United States at 44, supports the Government's position here. The *Trucking Association* case involved a change in the ICC's twenty-five year old policy of requiring railroads' consent to truckers' use of certain facilities, based upon "changing needs and patterns of transportation." 387 U.S. at 416. CEQ has failed to identify any changing needs or patterns that would justify its dramatic about-face. Moreover, *Trucking Association* involved an area in which Congress had directed by the very broad and general language of the statute that the agency exercise its discretion in a quasi-legislative fashion, as distinct from the more purely interpretive issue of statutory construction involved here.

Automobile Club v. *C.I.R.* considered whether the doctrine of equitable estoppel barred the IRS from correcting a legal mistake made in issuing an exemption ruling by collecting taxes due from years past. Its holding does not seem to bear on a change in administrative policy purportedly justified by the agency's experience in administering the Act. Of the remaining cases cited by the Government on this point, only one, *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), involved a complete reversal of position. The majority's reasoning in upholding that change rested on its perception that the new interpretation was more consistent with the legislative history than the prior one. Since the prior CEQ interpretation is more consistent with the legislative history of NEPA, for reasons set forth in the Brief of Respondents, the *Chisholm* case is in no way inconsistent with the view that the CEQ's earlier interpretation was correct.

allude to the possibility of excluding "appropriations" from the prior definition of "legislation." 43 Fed. Reg. 25230 *et seq.* In a footnote on page 25245 of the Proposed Rules, CEQ stated that:

> [T]he council in consultation with OMB had been prepared to propose this [new] wording . . . for comment. Thereafter, *Sierra Club* v. *Andrus*, (D.C. Cir. No. 75-1871, May 15th, 1978) was decided. We would appreciate comment on the implications of that case for these provisions.

No analyses, explanations, justification or statement of purpose accompanied the proposal.

In the final rules and regulations issued November 29, 1978, and effective July 30, 1979, the CEQ offered the following as the sole justification for this major change:

> On the basis of traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors, the Council decided not to alter the scope of this provision. *The Council is aware that this is the one instance in the regulations where we assert a position opposed to that in the predecessor Guidelines.* Quite simply, the Council in its experience found that preparation of EIS's is ill-suited to the budget preparation process. (Emphasis added). 43 Fed. Reg. 55989.[15]

This brief statement does not contain the "reasoned analysis" that is essential before a court will defer to an agency's interpretation that conflicts with an earlier,

[15] Although a minor point, the government is inaccurate in stating that CEQ noted that no appropriations EISs had ever been filed. Brief for the United States at 42 n.32. What CEQ stated is that some persons *commenting* on the proposed change had noted that no such EIS was filed. *See*, 43 Fed. Reg. at 55989. The inaccuracy is demonstrated in the Government's Brief in the Court of Appeals where, at p. 16 n.6, it states that the Bonneville Power Administration within the Interior Department had prepared EISs in connection with its annual appropriation requests.

contemporaneous interpretation. The Council wholly fails to explicate what "traditional concepts relating to appropriations in the budget cycle" are involved, why they preclude submission of an EIS, or indeed, why the preparation of EISs is "ill-suited" to the budget process. The absence of explanation is particularly striking because the new regulations provide for great flexibility in timing, permit confidential portions of EISs relating to classified data to be withheld, and establish a wholly separate procedure for EISs that accompany legislative proposals specifically designed to accommodate Congressional schedules. *See* CEQ Regulations at § 1501.8 (each agency to set own time limits for NEPA process); § 1506.8 (EIS on "proposal for legislation" need not comply with other regulations); § 1507.3(c) (nondisclosure of classified material in an EIS). Thus, while CEQ has shown itself capable of regulating with the requisite degree of flexibility in this area, it offers no reasoning whatsoever for the conclusion that no degree of administrative flexibility can accommodate the requirements of § 102(2)(C) of NEPA in the budget process.[16]

In view of these factors, particularly the fact that this is the *only* instance in which the Guideline's position was reversed in the new Regulations, no deference should be accorded this recent interpretation of NEPA's applicability to requests for appropriations. The circumstances surrounding CEQ's abrupt about-face, together with the cryptic nature of the agency's purported justification for the change, provide strong "danger signals" that the new change in policy is not well-founded. *Greater Boston T.V. Corp.* v. *FCC*, *supra*, 444 F.2d at 851-52. By contrast, CEQ's contemporaneous adoption nine years ago of the

[16] The absence of reasoning is particularly disturbing because the agency's change in position concerns a fundamental aspect of the statute, rather than a question of procedural detail more customarily left to an agency's discretion within broad statutory parameters.

position, amply supported by the legislative history, that the budget process was not excluded from the reach of § 102(2)(C), should be accorded substantial weight.

III. The Court of Appeals' Holding Will Not Interfere With the Current Budget Process Or the President's Exercise of His Executive Functions.

The government attempts to sketch a parade of horribles that would allegedly result from affirmance of the ruling below. First, it suggests that it is "questionable" whether there is enough time in the budget cycle to prepare an EIS, or indeed, whether an EIS could be prepared at all. Brief for the United States at 43-48 & n. 36. Second, it is suggested that the Court of Appeals holding "threaten[s] the essential political discretion exercised by the President" by compelling disclosure of predecisional agency documents. Brief for the United States at 50. Finally, the government urges that any requirement that an EIS accompany an agency's budget request would "raise serious constitutional questions" by "impos[ing] procedural restrictions on the information the President may receive from executive agencies in the performance of his discretionary and political responsibilities for the Budget." Brief for the United States at 32-33.

At the outset, it is important to emphasize what is and is not involved in this case. Many of the government's arguments—particularly those relating to the burdens of time and paper work upon the budget process—would have been more appropriately raised as objections to the District Court's holding that *all* annual budget requests for environmental programs be accompanied by an EIS. *See, e.g.*, Brief for the United States at 47. That holding is no longer at issue, however, for the Court of Appeals reversed the District Court's grant of declaratory relief and held that an EIS for budget requests is

required only under the limited circumstances described earlier. Thus, the Court of Appeals holding requires that each agency, in the approximately ten-month process of preparing its requested budget before sending it to OMB, identify any major changes in proposed budgeting or policy that would have significant environmental impact; consider and analyze the environmental consequences and alternatives to these decisions, if any; and put in writing its conclusions concerning these matters. This report—the Environmental Impact Statement—would then accompany the agency's budget request on its path to OMB, the President, and ultimately, the Congress. Finally, the EIS would be "made available to the public for comment in accordance with the procedures of 5 U.S.C. § 552 [The Freedom of Information Act (FOIA)]." 42 U.S.C. § 4332(2)(C). It is within this context, and *not* that of the district court's holding, that the government's objections must be evaluated.

A. Timing and Practicability.

As this Court noted in *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma, supra,* NEPA imposes a duty on all federal agencies to comply with its mandate "to the fullest extent possible." NEPA does not, however, repeal by implication other federal statutes, and thus where there is a "clear and unavoidable conflict in statutory authority," the requirements of NEPA must yield. 426 U.S. at 788, 96 S.Ct. at 2438. But this exception to NEPA requires more than mere administrative difficulty or burden, lest Congress's clear intent to impose a "duty . . . upon the agencies to consider environmental factors" be frustrated. *Ibid. See e.g., Texas Comm. on Natural Resources* v. *Bergland,* 573 F.2d 201, 207-08 (5th Cir. 1978); *Concerned About Trident* v. *Rumsfeld,* 555 F.2d 817, 823 (D.C. Cir. 1976); *cf. Gulf Oil Co.* v. *Simon,* 502 F.2d 1154, 1157 (Temp. Em. Ct. of Appeals 1974). The statutory duty of compliance "to the fullest extent possible" mandates ad-

herence to NEPA's procedural directives "*unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." 115 Cong. Rec. 39703 (1969) (House conferees) (Senate conferees) *id.* at 40417-18, *quoted in Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma, supra,* 426 U.S. at 788, 96 S Ct. at 2438; *Calvert Cliffs' Coordinating Committee* v. *AEC, supra,* 449 F.2d at 1114; *Environmental Defense Fund* v. *Corps of Engineers,* 492 F.2d 1123, 1131 (5th Cir. 1974).

In *Flint Ridge* this Court was faced with an absolute statutory requirement that HUD permit a registration statement under the Interstate Land Sales Full Disclosure Act to become effective within 30 days unless certain specified findings were made. Reconciliation of this statutory mandate and the NEPA requirements was impossible. The government here fails to point to a single statutory requirement imposing a comparably strict time limit on agencies' involvement in the budget process that would render compliance with NEPA impossible. Indeed, the contrast between the ten-month process that agencies undergo to prepare their budget and the 30-day period involved in *Flint Ridge* would of itself belie such an argument.[17]

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[17] Where several agencies are involved in approving a proposal, one agency is designated the "lead" agency and assumes primary or sole responsibility for the EIS. CEQ Guidelines, 40 C.F.R. § 1500.7; CEQ Regulations at § 1501.5, 43 Fed. Reg. 55992-93. Thus, only one agency would be responsible for preparing an appropriations EIS under the Court of Appeals holding—in this case, the Interior Department. That agency undergoes an extended process of intra-agency consideration of budgetary needs, which involves the preparation of "program strategy" papers by bureau chiefs and of "secretarial issue papers" by the assistant secretaries months before the budget request is submitted to OMB. See Brief for the United States at 9. The fundamental issues and contemplated changes doubtless emerge in this process with sufficient clarity to permit work to begin on an EIS in time to allow its submission to OMB in accordance with existing schedules for budgetary submission.

On close examination, it is apparent that the government does not even attempt to meet the *Flint Ridge* standard. It makes no effort to show that it would be impossible for agencies to fulfill their statutory duties under the Budget and Accounting Act and at the same time comply with NEPA. Instead, the government presses the notion that the procedural and substantive requirements of § 102(2)(C) lack the flexibility needed to deal appropriately with the unique circumstances of the budget process, and accordingly, that compliance with NEPA would be difficult. This line of argument does not advance an accurate description of § 102(2)(C), and it certainly is not sufficient to excuse compliance with NEPA.

Although the federal courts have been vigilant in assuring agencies' compliance with NEPA's procedural requirements, they have also recognized that NEPA is "not a straight jacket," *Scientists' Institute for Public Information* v. *AEC,* 481 F.2d 1079, 1092 (D.C. Cir. 1973), and "does not intend to impose an impossible standard," *EDF* v. *Corps of Engineers, supra,* at 1131. *Accord, NRDC* v. *Morton,* 458 F.2d 827, 837 (D.C. Cir. 1972); *State of Louisiana* v. *F.P.C.,* 503 F.2d 844, 865-77 (5th Cir. 1974). The more flexible approach found in the new CEQ regulations, on which the government so heavily relies in discussing whether an EIS is required at all, demonstrates that the timing requirements of the budgetary process—however pressing—do not pose a conflict with the basic statutory requirements of NEPA.

The absence of a "clear and unavoidable" conflict is illustrated by CEQ's adoption of a more lenient rule governing the preparation of an EIS accompanying a proposal on legislation than that applicable to an EIS prepared to accompany a major federal action. The requirement for a draft EIS followed by a final EIS,

while retained for proposals on "major Federal action," has been eliminated for such statements when they accompany legislative proposals. In recognition of the difficulties created by the agencies' lack of control over Congressional hearing schedules and decisions, § 1506.8 of the regulations provides that, except in limited circumstances, the transmittal of a single legislative EIS to the Congress and to federal, state and local agencies and the public for review and comment is all that is required. 43 Fed. Reg. 56001-02.[18] Further, in recognition of the frequent need to transmit legislative proposals to Congress on an urgent basis and without advance warning, CEQ has provided that the EIS need not accompany the legislative proposal but may follow it within thirty days. *Id.*[19] The government offers not a single reason why a similarly flexible approach could not be tailored to any unique requirements of the budget process and implemented under the Court of Appeals' holding.[20]

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[18] The regulation also provides that no "scoping process" need be had for a legislative EIS, and that "[c]omments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction," § 1506.8(b)(1), (c), 43 Fed. Reg. 56001-02.

[19] CEQ explained that "legislative proposals [are] different from proposed actions to be undertaken by agencies in several important respects . . . . [T]he timing of critical steps . . . is not under the control of the administrative agency. Congress will hold its hearings or take its votes when it chooses, and if an EIS is to influence those actions, it must be there in time. . . . Administration proposals are considered alongside other proposals introduced by members of Congress and the final product, if any, may be substantially different from the proposal transmitted by the . . . agency. . . . [Thus], the Council determined that it would be overly burdensome and unproductive to require draft and final [EISs] for all legislation . . . [Since] proposals are often transmitted on an urgent basis . . . the Council [provided] for a period of 30 days for transmittal of legislative environmental impact statements." 43 Fed. Reg. 55988 (Nov. 1978).

[20] Whether an appropriations EIS were regarded as a proposal for "legislation" or for "major Federal action" CEQ could treat it as *sui generis* for purposes of regulations relating, *e.g.*, to the need for a draft EIS; the length of any comment period; or the timing of public relase, since § 102(2)(C) itself is silent on these matters.

The government's suggestion that an appropriations EIS could not be prepared regardless of how much time were involved, Brief for the United States at 48 n.36, is baseless. Following judgment in the district court in this very case, the government issued an environmental impact statement that focused on broad funding levels and the effect of those budgetary options on the Fish & Wildlife Service. The Court of Appeals found that this programmatic EIS met any NEPA requirements. 581 F.2d at 904, 906. The government's argument that such an EIS could not be prepared is thus belied by its own actions in this very case.

B. Confidentiality.

The government's argument that the need for confidentiality in the budget process would be threatened by subjecting that process in any way to NEPA requirements founders on a number of points. Primary among these is that NEPA's requirement that EISs be made available to the public is expressly conditioned upon the requirements of the FOIA. NEPA provides that "Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies . . . shall be made available . . . to the public *as provided by section 552* of Title 5. . . ." 42 U.S.C. § 4332(2)(C) (emphasis added). Thus, to the extent that the government is correct that such EISs would constitute predecisional memoranda exempt from public disclosure under 5 U.S.C. § 552(b)(5), NEPA by its own terms would not require their disclosure. Given NEPA's clear incorporation of FOIA exemptions, this Court need not decide whether and to what extent an appropriations EIS would be exempt from disclosure. It is sufficient to find that, if exempt under FOIA, NEPA compels no different result.

NEPA does not provide, as the government seems to suggest, that if FOIA authorizes withholding a statement from the public, the agency is wholly relieved of its obligation to prepare and have the EIS accompany its proposal *within* the government. This suggestion is inconsistent with the plain language of § 102 which exhorts all agencies to comply "to the fullest extent possible," and with Congress' insistence that this provision "not be used by any Federal agency as a means of avoiding compliance with [§ 102(2)(C)]," Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969) at 10. Given NEPA's primary purpose of requiring government decision-makers to carefully consider the environmental consequences of proposed action, an EIS must be prepared and used in the internal government decision-making proces even in cases in which some or all of that statement may not be required to be publicly disseminated.

Although NEPA itself thus provides the solution to any confidentiality problem, amicus strongly disagrees with the suggestion that such material would be entitled to be withheld entirely from the public under FOIA or under any other notion of confidentiality in government decision-making. Section 206 of the Budget and Accounting Act of 1921, 31 U.S.C. § 15, does not address the issue of confidentiality; it requires only that in the absence of a request from Congress no agency make a submission directly to Congress concerning appropriations. This is hardly the kind of clear directive required to restrict the flow of information concerning government functions to the public.[21]

Furthermore, even if FOIA's exemption for predecisional memoranda were found applicable, this would not justify withholding the entire document from the

[21] The government in any event makes no claim that EISs would be exempt from FOIA disclosure under 5 U.S.C. § 552(b)(3). *See Administrator, FAA* v. *Robertson*, 422 U.S. 255, 95 S.Ct. 2140 (1975); 5 U.S.C. § 552(b)(3).

public. While the policy underlying the (b)(5) exemption might justify withholding the agency's specific recommendation expressed in the EIS, cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827 (1973); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 95 S.Ct. 1491 (1975), the factual basis of its conclusion—its analysis of the effect of its alternative funding levels on various environmentally significant programs—would be publicly available under the well-established distinction in (b)(5) FOIA claims between "factual" and "policy" matters, *see, e.g. E.P.A.* v. *Mink, supra*, 410 U.S. at 87-89, 93 S.Ct. at 836-37, and FOIA's provision requiring disclosure of "[a]ny reasonably segregable portion of a record." 5 U.S.C. § 552(b). Indeed, CEQ's regulations now provide for just such a procedure in the case of environmental impact statements prepared in part on the basis of classified information.[22]

Specific decisions relating to the release and timing of appropriations EISs are obviously delicate ones, suitable for the considered judgment of CEQ in future rulemaking proceedings. Decisions on these matters will require, among other things, balancing the Congressional determination in NEPA that public comment would aid in the agency's decision-making process against the desirability of avoiding interference with an ongoing decision-making process in the highest levels of the Executive Branch. The important point for now, however, is that NEPA does

[22] Section 1507.3(c) expressly provides that an agency's procedures may:

> [I]nclude specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. . . . [E]nvironmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination. . . . These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

not preclude the CEQ and other agencies from taking a flexible approach to this problem that will assure confidentiality where it is required.[23] That is all this Court need decide. Since there is no "clear and unavoidable conflict" in this regard, the government's argument that the agency is wholly relieved from NEPA's obligations must be rejected.

C. Separation of Powers.

Finally, the government suggests that reading NEPA to require an agency to prepare an EIS on budget requests will interfere with the President's ability to communicate effectively with his Cabinet and with the Congress and thus poses constitutional difficulties that could be avoided simply by reading the budget process out of NEPA. This position is wholly without merit, as is demonstrated in the Brief for Respondents and the Brief of the National Wildlife Federation and Defenders of Wildlife as Amici Curiae.

The Society would add only that while constitutional problems might arise if Congress were to prohibit a Cabinet member from communicating with the President, the requirement that an agency prepare an EIS to accompany its budget requests to OMB is not in the slightest sense a restriction on intra-branch communication.[24] An

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[23] In addition to the possibility of partial disclosure of factual aspects of the EIS, nothing on the face of § 102(2)(C) would prevent the timing of the public release of the EIS to be deferred until after the President has made his submission to Congress.

[24] The only sense in which the requirement that an agency accompany a budget request with an EIS could be a "restriction" on the provision of advice to the President is if a court were to enjoin submission of the budget to OMB pending completion of an EIS. Respondents have never sought such injunctive relief, however, and the equitable powers and jurisdiction of a federal court are more than sufficient to be able to fashion a remedy in the event of a violation that would *not* interfere in the budget process. *See, e.g., Goose Hollow Foothills League* v. *Romney*, 334 F.Supp. 877, 880 (D. Or. 1971); *Atchison, Topeka & Santa Fe Railway Co.* v. *Callaway*, 431 F.Supp. 722, 727 n.5, 730 (D. D.C. 1977); *see also Comm. for Nuclear Responsibility* v. *Seaborg*, 436 F.2d 796 (D.C. Cir. 1971).

EIS enlarges the pool of information available to federal decision-makers (including the President) without imposing limitations on the advice or opinions given.

The EIS requirement is a wholly proper exercise of Congress's constitutional law-making power, involving no greater intrusion into the domain of the Executive Branch than the requirement that heads of federal departments annually prepare requests for appropriations, 31 U.S.C. § 22;[25] that the President submit a budget to Congress by a specified date, 31 U.S.C. § 11(a); or the requirements that spell out in detail the contents of the President's budget, 31 U.S.C. § 11(a)(1)-(13). Preparation and submission of an EIS along with an agency's budget request may require additional effort by the agency but is in no way qualitatively different from these unchallenged statutory directives. If Congress can constitutionally require department heads to prepare annual

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[25] The agency's preparation and submission of a proposed budget is thus not only a recommendation to the President but a congressionally imposed duty. This distinguishes the primary case relied on by the government for the propositions that an EIS need never accompany a Presidential proposal or an "opinion" or advice given by a member of the President's Cabinet to the President, *Alaska* v. *Carter*, 12 E.R.C. 1486 (D. Ala. 1978). In contrast to the function performed by the Secretary of the Interior in the *Alaska* case, that of responding to a discrete Presidential request for advice, the Secretary has an independent statutory duty to "prepare or cause to be prepared in each year his requests for regular, supplemental or deficiency appropriations." 31 U.S.C. § 22. Moreover, preparation of a proposed departmental budget is a function that, even without Congress's express statutory directive, would have to be performed from any practical point of view by the agency to determine its own priorities. Finally, in *Alaska* v. *Carter*, numerous and detailed impact statements had been prepared concerning the withdrawal of lands; the only question decided by the District Court was whether a 30-day comment period on a draft supplemental EIS should be extended.

budgets, it additionally can require the agency to prepare an EIS to accompany those budget requests that would "significantly affect the quality of the human environment."

IV. Congressional Policy Would Be Frustrated by a Blanket Exemption of the Budget Process from NEPA's Procedural Requirements.

The Society believes that it is most important that the Court appreciate the degree to which NEPA's fundamental purposes would be frustrated should the budgetary process be wholy excluded from the statute.[26] In the court below, even the government recognized that there would be instances where the first "proposal" of a new project would occur in the agency's request for funding. *See* Govt. Br. in the Court of Appeals at 59 n.34. Given the clear thrust of NEPA to require, as early as possible, full consideration of environmental impacts and alternatives of proposed agency action and the corresponding absence of any indication in either NEPA or its legislative history that requests for appropriations were intended to be wholly exempt from its requirements, any such wholesale exclusion is totally unwarranted.[27]

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[26] It bears emphasizing that the Court need not decide whether the budget process is *wholly* exempt from § 102(2)(C). The Court is free to reject the holdings of the two courts below that requests for appropriations are proposals for legislation within the meaning of the statute and still decide that on occasion such requests may constitute proposals for "major Federal action" or alternatively, remand that issue for consideration in the Court of Appeals. *See* note 7, *supra; Dandridge* v. *Williams, supra,* 397 U.S. at 475-76 n.6, 90 S.Ct. at 1156-59, n.6.

[27] Amicus recognizes that the federal budget is limited and that on particular decisions environmental concerns may properly be secondary to other national interests. The EIS requirement, however, seeks only to identify the environmental concerns and to focus analysis on the relative environmental consequences of the decision. The importance of these functions is highlighted by recent testimony at Congressional hearings by the Executive Director of the Wilderness Society that "the confusing nature of the budget presentation for [the Park Service,]" made it very difficult to determine "how much is being expended on . . . routine facility maintenance, preservation of buildings, [and] construction of roads and bridges. . . ." The testimony also noted that the proposed budget for Park Service land acquisition had been cut from $253 to $156 million. One of the environmental consequences was that only $14.3 million for FY 1980 was requested for completion of the Appalachian Trail, notwithstanding an authorized amount of over $45 million. Given the "expected escalation of land values" in the relevant states, that budget decision could result in much higher costs to protect the Trail, if indeed the opportunity were not altogether lost. Testimony of William A. Turnage before the Senate Appropriations Comm. on the Department of Interior and Related Agencies (March 6, 1979) at 1-2.

The government's contorted efforts to escape from the clear language, scope and purpose of NEPA should be rejected. While it may be difficult for federal agencies to prepare environmental impact statements even in the limited circumstances under which they would be required under the Court of Appeals holding, this difficulty arises not so much from considerations of timing, but rather from the fact that, as far as the record reflects, budget requests may not be made on a program-by-program basis.[28] Far from justifying abandoning the EIS requirement, the absence of programmatic consideration of the environmental consequences of the budget process emphasizes the importance of the EIS, which Congress intended to be its primary procedural sword in enforcing NEPA's substantive mandate.

In any event, considerations of administrative convenience are more properly addressed to Congress than to this Court. Despite the government's effort to portray the Court of Appeals' holding as an intrusion into the legitimate affairs of other branches of government, we

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[28] In its Court of Appeals Brief, at 39, the government stated that "the Refuge System is not a separate line item in the Budget or in appropriations," and seems to indicate that it was the preparation of the programmatic EIS issued after judgment in the District Court that caused the Department to prepare a "break-out showing refuge funding for fiscal years 1974-1975."

submit that it is the government that seeks to have this Court frustrate the will of Congress. Just as the Court in *Tennessee Valley Authority* v. *Hill*, 98 S.Ct. 2279 (1978), recognized its obligation to adhere to the plain language of the Endangered Species Act despite the government's arguments that it would produce an "absurd" result, so too should the Court adhere to the plain language and policies of NEPA in spite of the government's prophecies of the difficulties of compliance. As the Court in *TVA* v. *Hill* emphasized in explaining its holding that an injunction should have issued to restrain operation of the dam:

> Our system of government is, after all, a tripartite one, with each Branch having certain defined functions delegated to it by the Constitution. While '[it] is emphatically the province and duty of the judicial department to say what the law is,' *Marbury* v. *Madison*, 5 U.S. 137, 177, 2 L.Ed 60 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects but also to establish their relative priority for the Nation. *Once Congress*, exercising its delegated powers, *has decided the order of priorities in a given area, it is for the Executive to administer the laws* and for the courts to enforce them when enforcement is sought. (Emphasis added.) 98 S.Ct. at 2301.

These words apply with particular force here. The courts' "individual appraisal of the wisdom or unwisdom of a particular course selected by Congress" must be put aside, "once the meaning of an enactment is discerned and its constitutionality determined." 98 S.Ct. at 2302. NEPA manifests a clear intention that all federal agencies making proposals for any major federal action, including certain budget requests, undertake the kind of serious analysis mandated by § 102(2)(C). And Congress remains available as a source of relief to federal agencies

in the event that they determine that the requirements of NEPA, even under the flexible approach represented by the new CEQ Regulations, cannot be met.

CONCLUSION

Accordingly, amicus submits that the judgment and decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and JAMES T. McINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICI CURIAE NATIONAL WILDLIFE FEDERATION AND DEFENDERS OF WILDLIFE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and JAMES T. McINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET,
Petitioners,

v.

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BRIEF FOR AMICI CURIAE NATIONAL WILDLIFE FEDERATION AND DEFENDERS OF WILDLIFE

Amici have received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A to the Petition for a Writ of Certiorari and is reported at 581 F.2d 895 (D.C. Cir. 1978). The opinion of the district court is set forth in Appendix B to the Petition for a Writ of Certiorari and is reported at 395 F. Supp. 1187 (D.D.C. 1975).

QUESTION PRESENTED

Where a Federal agency, in the course of preparing a budget request for a specific on-going program significantly affecting the environment, has conducted a painstaking reappraisal of the program or proposes to significantly change the status quo with respect thereto, is the resulting budget request a "proposal for legislation" or a "proposal for other major Federal action" so as to require the agency to prepare and consider an Environmental Impact Statement pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA), or is the agency free to ignore the environmental aspects of the program in such circumstances?

INTEREST OF AMICI CURIAE

National Wildlife Federation ("NWF") is a nonprofit corporation organized under the laws of the District of Columbia. It is a conservation organization dedicated, *inter alia*, to the preservation of natural resources on the North American continent. NWF's total membership exceeds two million persons.

Defenders of Wildlife ("Defenders") is also a nonprofit corporation organized under the laws of the District of Columbia. It is devoted primarily to the protection and preservation of wildlife in the United States and around the world. Defenders has over 42,000 members.

The National Wildlife Refuge System, administered by the Fish and Wildlife Service of the Department of the Interior, was established for the preservation of vital habitat for the nation's wildlife and "for the management of wildlife and wildlands to obtain the maximum benefits from these resources." 50 C.F.R. § 25.11 (b). The ability of the System to meet its purposes is

largely dependent upon its funding.[1] Professional observers have pointed out that the System has perennially suffered from insufficient funds and confusion concerning its purposes.[2]

Members of NWF and Defenders engage in nonconsumptive use and enjoyment of the natural resources encompassed by the National Wildlife Refuge System. Their use and enjoyment of the System are directly affected by the manner in which environmental issues regarding the System have been considered in the budget process. Moreover, on behalf of their members NWF and Defenders regularly collect, distribute and review information concerning agency budget requests bearing upon environmental concerns, including the programs administered by the Department of the Interior and its Fish and Wildlife Service relative to the National Wildlife Refuge System. NWF and Defenders also present the views of their members with regard to the funding and direction of the National Wildlife Refuge System to public officials and to Congress. The ability of NWF and Defenders to perform these informative functions is and will be directly affected by the manner in which environmental issues relating to the System have been and will be considered in the budget process.

STATEMENT OF THE CASE

NWF and Defenders adopt the statement of the case set forth in the brief of respondents Sierra Club, *et al.*

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[1] "Improving and expanding wildlife habitat are not simple matters of buying bits of pristine paradise; most often these are overgrazed, heavily logged, drained or burned properties requiring capital investment in dams, fences, forest restoration, and other expensive rehabilitation." Doyle, *Our National Wildlife Refuges: A Chance to Grow*, 155 Nat'l Geographic 342, 348 (1979).

[2] Doyle, *supra* note 1, at 348.

SUMMARY OF ARGUMENT

1. The Government is wrong in contending that a budget request, because it is subject to rejection or modification by OMB and the President, is too "tentative" to constitute a "proposal" giving rise, under NEPA, to an obligation to prepare an Environmental Impact Statement. The whole point of NEPA is that environmental considerations should be taken into account before final decisions on Federal programs are made, and Congress itself has recognized that for Federal programs generally the budget process is the vital decision-making stage in their development. Accordingly, the court below was correct in holding that whenever a budget request encompasses a reappraisal or revision of a Federal program, it must be accompanied by the environmental analysis required by NEPA.

2. In the absence of any "clear and unavoidable conflict" between NEPA and the statutory provisions which govern the budget process, there is no justification for not applying NEPA's requirements to that process. The Government here contends that as a matter of policy the budget process should not be so burdened, but the Government's own conduct below demonstrates the feasibility of conducting a NEPA environmental evaluation in connection with budget requests and without jeopardizing the budget process in any way.

3. Contrary to the Government's contentions, a requirement that an EIS be prepared in connection with a budgetary reappraisal or revision of a program would not in any way interfere with the freedom of the President and the Executive Branch to consult together and

to make their own unfettered decisions as to where the public interest lies. NEPA requires that environmental factors be considered in the decision-making process, but it does not preclude the decision-maker, once he has considered them, from acting in contravention of the environmental interests involved. To hold that environmental impact may be entirely excluded from consideration in the budget process would be a serious blow to the purpose of the National Environmental Policy Act.

ARGUMENT

I. THE HOLDING BELOW IS COMPLETELY CONSISTENT WITH THE INTENT AND PRIOR INTERPRETATIONS OF NEPA, AND THE GOVERNMENT'S EFFORTS TO ESCAPE FROM THE LANGUAGE OF THE STATUTE ARE UNAVAILING

The Court of Appeals below held that, where a Federal agency, during the budget process, takes either one of two types of action with respect to an ongoing Federal program, it must prepare an Environmental Impact Statement ("an EIS") under NEPA. The two types of budgetary action which thus trigger an EIS obligation, according to the Court of Appeals, are: (1) a proposal to take "new action which significantly changes the status quo" of the program, 581 F.2d at 903, and (2) a "painstaking review" or "programmatic review" of the program involved. *Id.*

It should be emphasized at the outset that, judging by the legislative history of NEPA and the case law which has developed thereunder, each of these two types of action would plainly give rise to an EIS obligation if such action were taken *apart* from the budget process—and the Government's brief in this case does

not appear to contend otherwise.[3] In other words, the Government appears to concede that if either type of action is taken independent of any budget request, an EIS would have to be prepared (in order to ensure that the agency was aware of the environmental consequences of the program which it was either changing or reevaluating), but the Government nevertheless contends that if such actions take place in the context of the budget process, they somehow thereby become exempt from NEPA. That theory, we submit, cannot withstand examination.

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[3] If the Government argues that the decision of the Court of Appeals is wrong because an EIS is not required for proposals emanating from a painstaking programmatic review or for proposals to change the status quo, then the Government is incorrect. The legislative history of Section 102(2)(C) makes clear that the section was intended to apply to programmatic reviews and changes in the status quo. The Senate Report on Section 102 (2)(C) provides that EIS's are required for all "major actions, such as project proposals, proposals for new legislation, regulations, policy statements or expansion or revision of ongoing programs." S. Rep. No. 296, 91st Cong., 1st Sess. 5, 20 (1969). Moreover, this Court has already ruled that programmatic EIS's are required when an agency, after a review, adopts a "coherent plan," Kleppe v. Sierra Club, 427 U.S. 390, 400 (1976), and when an agency develops a program whose component parts have a "cumulative or synergistic" environmental impact. Id. at 409-10. The requirement of an EIS for a program, policy, or plan arising out of a programmatic review has been uniformly embraced in other decisions (*e.g.*, Environmental Defense Fund v. Adams, 434 F. Supp. 403 (D.D.C. 1977); Natural Resources Defense Council v. Hodel, 435 F.Supp. 590 (D. Ore. 1977); *see also* Natural Resources Defense Council v. Administrator, 451 F.Supp. 1245, 1258 (D.D.C. 1978)); in applicable guidelines (40 C.F.R. § 1500.6(d)(1) (1977); CEQ, Fifth Annual Report 393 (1974)) and regulations (43 Fed. Reg. 56004-05, promulgating 40 C.F.R. § 1508.18); and by commentators. *See, e.g.*, W. Rodgers, Environmental Law § 7.9 at 785-87 (1977); Note, *Program Environmental Impact Statements: Review and Remedies*, 75 Mich.L.Rev. 107 (1976).

The theory stems from the proposition that all budget requests are "tentative and provisional" (because they are subject to rejection or modification by OMB and by the President) and that anything that is that "tentative" cannot be a "proposal" within the meaning of NEPA.[4] But the intent and the words of NEPA make plain that Congress affirmatively wanted EIS's to be prepared *before* the final decision-making stage, precisely because it wanted the final decision-maker to take the relevant environmental considerations into account; thus the statute speaks of preparing EIS's in connection with "recommendations" and "proposals" in order to ensure that the environmental evaluation occurs before any final decision is made.[5] In short, every "proposal" is "tentative and provisional" by definition,[6] and an agency budget request, since it is

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[4] Brief of Petitioners at 19, *et seq.*

[5] *E.g.*, Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 511 (D.C. Cir. 1974); Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977). In Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975), this Court indicated that an EIS was required for an agency action (there, approval of a general rate increase for railroads) even though the agency action was subject to subsequent re-consideration, review, modification, and even recision.

[6] According to Webster's New International Dictionary (2d ed. 1954, unabridged), "proposal" means:

> "1. A proposing, or setting forth for consideration; statement; as, the *proposal* of his views.
>
> "2. Something proposed for consideration or acceptance; an offer, as of terms or conditions of agreement or of marriage; a scheme, a plan, a bid, or the like, formally submitted; as to listen to the committee's *proposals;* to have had many *proposals* in her youth. . . ."

The same dictionary defines "reports" as follows:

> "2.a An account or relation, esp. of some matter specifically investigated; . . . . c. An official statement of facts, oral

the agency's proposal or recommendation to OMB and the President as to what should be done in budgetary terms, is plainly a "proposal" within the ordinary meaning of that term. By the same token, where an agency has reevaluated a program and made a budget request based thereon, or where it seeks to expand or revise the program and has requested the necessary funds, it has clearly made a "proposal" within the meaning of NEPA.

This result comports fully with the decisions of this Court dealing with what does and does not constitute a proposal for purposes of Section 102(2)(C). In *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976), the Court cautioned that an EIS requirement may not be imposed when an agency merely undertakes a study or contemplates *subsequent* development of a proposal. But a concrete budget request which an agency submits for OMB and Presidential approval is a far cry from a vague study or a mere suggestion of possible action

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or written; as, the *report* of a Committee to the Senate; d. A statement in writing of proceedings and facts exhibited by an officer to his superior; as the *reports* of the heads of departments to Congress. . . ."

Likewise, the definition of "recommendation" is given as

"1. Act of recommending. . . .

"4. A thing, course of procedure, or the like, recommended."

"Recommend" means:

"3. To commend, or bring forward explicitly, as meriting consideration, acceptance, adoption, election, or the like; to present as one's advice, one's choice or as having one's approval or support; to offer or suggest with favoring representations; as, to *recommend* a newcomer to one's friends, a defendant to the mercy of the court, the appointment of Brown to the postmasterhip. . . .

"5. To advise, counsel. . . ."

in the future; on the contrary, such a request envisions a defined level of government action (and a definite number of dollars) within the programs covered by the budget request for the fiscal year in question. Moreover, the budget request will inevitably and directly lead to a concrete decision as to the level of appropriation to be recommended to Congress. In other words, a formal budget request by an agency necessarily contains a clear "factual predicate for the production of an environmental impact statement of the type envisioned by NEPA." *Kleppe* v. *Sierra Club, supra,* 427 U.S. at 401-02. It is thus entirely appropriate to prepare an EIS in aid of such a report or recommendation on a proposal.

This conclusion is consistent with the purposes of NEPA. NEPA and other environmental statutes are designed to generate a "meaningful consideration and balancing of environmental costs against economic and other benefits." *Scientists' Institute for Public Information* v. *AEC,* 481 F.2d 1079, 1089 (D.C. Cir. 1973). The intent is to bring to light and focus attention on the environmental costs of a proposed undertaking before it is "too late to adjust the formulated plans so as to minimize adverse environmental effects." *Lathan* v. *Volpe,* 455 F.2d 1111, 1121 (9th Cir. 1971).[7] Accordingly, as noted above, NEPA requires consideration of environmental issues in the decision-making process *before* decisions are made and actions taken.[8]

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[7] *See also* Environmental Defense Fund v. TVA, 468 F.2d 1164, 1181-82 (6th Cir. 1972); City of Davis v. Coleman, 521 F.2d 661, 670 (9th Cir. 1975); Natural Resources Defense Council v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975); Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F. Supp. 908, 933 (D. Ore. 1977).

[8] *See* 43 Fed. Reg. 55990-92 (Nov. 29, 1978), promulgating 40 C.F.R. § 1500.1-.2 and § 1501.1-.3 (new CEQ regulations).

If environmental concerns are to be meaningfully addressed at all in the budget process, they must be considered by the time the agency submits its budget request to OMB.[9] Once such a budget request has been incorporated into the President's budget and transmitted to Congress, it is simply too late for the Executive Branch to effect alterations or modifications in the budget to accommodate environmental concerns and minimize adverse environmental impact.

Moreover, if the preparation of an agency budget request entails a reevaluation or a revision of an ongoing agency program, the simultaneous preparation of an EIS will obviously serve a useful purpose. In such circumstances the EIS will not only inform agency decision-makers of the environmental consequences of their new plan of action, but it will also inform OMB and the President of the consequences of funding the program at the level recommended in

[9] *See* H. Rep. 93-697, 93d Cong., 1st Sess., 6-7 (1973) ("The decisions of the Director of the Office of Management and Budget are in most instances the final Executive Branch decision on budget requests and on the legislative policy of the Executive Branch. . . . The Office of Management and Budget stands at the center of Federal policy-making with life and death decisions about programs and procedures.").

The two possible points for requiring an EIS in the budget context are at the time an agency budget request is forwarded to OMB, and at the time the President forwards the budget to Congress. The government suggests that the President is not an "agency" for purposes of NEPA and need not comply with the EIS requirement (which by its terms applies only to an "agency") at the time the budget is "proposed" to Congress. Brief of Petitioners at 31-32 n. 22. If this is so, then the agency budget request to OMB and the President is the only "proposal" by an agency for purposes of NEPA and, as such, clearly should be accompanied by an EIS.

the agency's budget request.[10] In addition, apart from promoting informed executive decision-making, the EIS will also provide both Congress and the public with valuable information of direct relevance to the appropriation process.[11] That being so, it is hard to take seriously the Government's suggestion that the holding below somehow tends to "trivialize" NEPA.[12]

In fact, NEPA would be "trivialized" only if it were not applied where it is applicable, and the types of decisions involved in the budget process are quite

[10] In its brief to the Court of Appeals below the Government admitted the general utility of a programmatic statement. The Government said,

> "The Programmatic EIS, instead of being tied to the evolving formulation of particular proposals for annual or supplemental appropriations for a given fiscal year, describes the environmental impacts of alternative dollar levels of funding the National Wildlife Refuge System. It is thus useable and reusable for informed decisionmaking throughout several fiscal years in connection with both budgetmaking and after the enactment of congressional appropriations, the control and timing of expenditures." Brief of the Appellants at 32.

The Government also stated:

> "The Programmatic EIS is . . . the best solution for Interior to address 'proposals' in annual Budgets over which Interior lacks decisive control and which are the product of recommendations made at successive steps prior to appropriations . . . and at successive steps after appropriations during the phase of budget execution . . ." Brief of the Appellants at 63.

In the Government's view, a programmatic EIS would not only serve decision-makers in the budget process but would also assist decision-makers in making spending decisions after a budget has been finally adopted.

[11] *See* Realty Income Trust v. Eckerd, 564 F.2d 447, 453-54 (D.C. Cir. 1977); Atchison, T & S.F. Ry. Co. v. Callaway, 431 F. Supp. 722, 727 (D.D.C. 1977).

[12] Brief of Petitioners at 46.

clearly of the kind to which NEPA should be applicable. Indeed, Congress itself recognizes that for any given Federal program the vital decision-making takes place as part of the budget process. In the words of the House Committee on Government Operations,

> "The Office of Management and Budget stands at the center of Federal policy-making with life and death decisions about programs and procedures. The budget is the great judgment book for Federal agencies and activities, recording which shall live and which shall die, which shall prosper and which shall wane. Unlike the situation 50 years ago, when the mix of Federal activities varied little from year to year, the budget now is the 'action forcing' process, involving new program decisions and billions of dollars each year." H. Rep. No. 93-697, 93d Cong., 1st Sess. at 7 (1973).[13]

Given the importance of the budget process in formulating national policy and programs, we submit, it would be very surprising indeed if it were somehow exempt from Section 102(2)(C), the central "action forcing" mechanism of NEPA,[14] our "basic national charter for protection of the environment."[15] Recognizing this fact, those courts which have considered the question have refused to exempt the budget process

[13] *See also* A. Wildavsky, The Politics of the Budgetary Process 2 (2d ed. 1974) ("Since funds are limited and have to be divided in one way or another, the budget becomes a mechanism for making choices among alternative expenditures").

[14] Calvert Cliffs' Coordinating Committee, Inc. v. USAEC, 449 F.2d 1109, 1113 & n.17 (D.C. Cir. 1971) (collects legislative history); W. Rodgers, *supra* note 4, § 7.4 at 725; *see* 43 Fed.Reg. 55990 (Nov. 29, 1978); *promulgating* 40 C.F.R. § 1500.1 (new CEQ regulations).

[15] 43 Fed. Reg. 55990 (Nov. 29, 1978), promulgating 40 C.F.R. § 1500.1 (new CEQ regulations).

from NEPA and instead have squarely held that Section 102(2)(C) applies to agency budget requests.[16]

In an effort to escape the foregoing holdings, the Government's brief devotes a great deal of attention to the proposition that an agency budget request, even if it seeks appropriations based upon a complete reappraisal of a Federal program or a change in the status of the program, is not a "proposal for legislation" within the meaning of Section 102(2)(C). We respectfully submit, however, that such argumentation, even if it were correct, would not support the conclusion advocated by the Government for the simple reason that such a budget request is plainly a "recommendation or report on a proposal for major Federal action", and any such recommendation or report triggers an EIS obligation, whether or not a "proposal for legislation" is involved. After all, any budget request of the kind described above in effect embodies the agency's plan of action for the fiscal year in question, and if the contemplated action is major and affects the environment, NEPA plainly requires the preparation of an EIS.

Finally, if NEPA in fact were ambiguous with respect to requiring an EIS for the two types of budget requests at issue here (*see* page 5, *supra*), any doubts would have to be resolved in favor of the application of NEPA. The statute itself calls for compliance "to the fullest extent possible," and the legislative history

[16] *E.g.*, Scientists' Inst. for Public Information, Inc. v. AEC, 481 F.2d 1079, 1088 (D.C. Cir. 1973); EDF v. Froehlke, 348 F. Supp. 338, 364 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973); EDF v. TVA, 339 F. Supp. 806, 811 (E.D. Tenn), *aff'd*, 468 F.2d 1164, 1181 (6th Cir. 1972); Aluli v. Brown, 437 F. Supp. 602 (D. Haw. 1977).

is in full accord. The House conferees on NEPA explicitly stated that no Federal agency was to rely upon "an excessively narrow construction of its existing statutory authorizations to avoid compliance" with NEPA, 115 Cong. Rec. 39703 (1969), and this Court itself has emphasized that the obligations imposed by NEPA must "not be shunted aside in the bureaucratic shuffle." *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787 (1976). Since the two actions encompassed within the holding below—the reappraisal and/or revision of a Federal program—would plainly require the preparation of an EIS if the responsible agency involved were not dealing with another agency (OMB) in the budgetary process, obviously they should not be immunized from NEPA's requirements merely because a second agency (OMB) is to be the recipient of the reappraisal or revision involved. *See* note 5 *supra.*

II. REQUIRING AN EIS FOR AGENCY BUDGET REQUESTS WHERE THOSE REQUESTS ARE BASED UPON PROGRAM REAPPRAISALS OR REVISIONS WOULD NOT BE INCONSISTENT WITH THE BUDGET PROCESS

Given the clear command of NEPA and the importance of taking environmental considerations into account in reappraising or revising existing Federal programs, there would seem to be only one way in which the Government could succeed in avoiding the preparation of an EIS in connection with a program reappraisal or revision incorporated in an agency budget request—namely, by showing "a clear and unavoidable conflict" between the requirements of NEPA and the requirements of another applicable statute. *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma, supra,* 426 U.S. at 788. In fact, since no such conflicting statute exists, it would seem that NEPA necessarily applies in precise accordance with the decision below.

With no statutory conflict available, the Government brief has fallen back upon a far less persuasive approach. The theory is simply that it would be highly inconvenient for Government agencies to comply with the decision below because, says the Government, an EIS could be prepared in the budget process only through "Herculean" efforts [17] and because "it is at least questionable if there is time in the budget cycle" to prepare an EIS.[18]

This line of argumentation is unpersuasive, not only because administrative inconvenience can hardly justify a departure from an affirmative statutory command but also because the inconvenience argument is factually undermined by the contentions made by the Government below. In the Court of Appeals the Government did not allege that the EIS requirement (particularly of the programmatic kind) would be unduly burdensome; on the contrary, the Government advised the court that it would be quite acceptable to require the preparation of programmatic EIS's as part of and in aid of the budget process:

> "In view of the multitudinous occasions which might or might not qualify as 'proposals for legislation and other major Federal actions significantly affecting the quality of the human environment' under NEPA, the use of a single Programmatic EIS for the vast number of such separate occasions, instead of separate EISs tailored to each

[17] Brief of Petitioners at 48.

[18] Brief of Petitioners at 46.

> single occasion, cannot be said to lack a 'reasonable basis in law.' [Citations omitted.] *The Programmatic EIS is thus an acceptable method of complying with NEPA in the circumstances of annual budget making.*" Brief of Appellants at 33 (emphasis added).

It seems entirely contradictory for the Government now to argue that when the Court of Appeals called for the preparation of a programmatic EIS in connection with the budget process, it was thereby imposing an unacceptable burden on the budget process.

Moreover, the Department of the Interior's own actions in this case belie the suggestion in the Government's brief. Interior has already prepared a programmatic EIS covering, among other things, alternative funding levels for the National Wildlife Refuge System, and the Government represented to the Court of Appeals that this EIS complied with any applicable NEPA requirement. *See* Brief of Appellants at 32. The fact that Interior, as part of the budget process, was able to prepare such an EIS in order to comply with NEPA seriously undercuts the Government's arguments as to the difficulty of compliance.[19]

In any event, the requirements of NEPA may be shaped to comport with any actual necessities of the budget process. Even if existing regulations or guidelines interpreting NEPA called for procedures or detail raising time or manpower problems within the budget cycle, new regulations tailoring the require-

[19] In its brief below the Government acknowledged that one agency within the Department of the Interior (the Bonneville Power Administration) even prepares a specific EIS in connection with its annual appropriation requests. Brief of Appellants at 16 n.6.

ments of Section 102(2)(C) to eliminate any actual conflicts with budget necessities could easily be devised and promulgated.[20] NEPA may readily be applied in a fashion which satisfies any legitimate needs of the budget process with regard to timing and similar concerns.[21]

[20] CEQ has already established two quite different basic procedures governing EIS's for proposed legislation and EIS's for proposed federal action. Under the CEQ regulations an agency proposing federal action generally must prepare a "draft" EIS which is circulated to the interested public and then revised into a final version in accordance with comments received. In contrast, no draft EIS (and, consequently, no pre-issuance circulation to the public) is required for proposals for legislation. *See* 43 Fed. Reg. 56001-02, promulgating 40 C.F.R. § 1506.8. The Government, on investigation, might find CEQ's new regulations fully compatible with the budget process, whether budget requests were placed in the "legislation" or "major Federal action" categories. It bears noting that the Government has not argued that the new CEQ regulations, if applied in the budget process, would necessarily be incompatible with that process. *See also* Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 322 (1975).

[21] In any event, contrary to the Government's contention, the effort required to prepare a suitable EIS to accompany a budget request is far from "Herculean." The new CEQ regulations provide that EISs shall ordinarily be less than 150 pages. 43 Fed. Reg. 55995, promulgating 40 C.F.R. § 1502.7. The basic alternatives to be examined in an EIS on a budget request are simple. They could be limited to the alternative of the previous year's level of funding, a somewhat higher level of funding, a somewhat lower level, no funding at all, and the agency's recommended level of funding if different from the foregoing. *See, e.g.*, Hearings Before Subcomm. of Fisheries & Wildlife Cons. & the Environment of House Comm. on Merchant Marine & Fisheries, 94th Cong., 1st Sess., at pp. 170-79 (1975) (discussion of application of Section 102(2)(C) to budget requests). Since the budget process is largely incremental without substantial change from year to year (at least in real as opposed to current dollar terms), most agencies whose budget request requires an EIS may be able to satisfy Section 102(2) by preparing a single assessment, to be

The Government also argues that application of Section 102(2)(C) to agency budget requests would be inconsistent with the confidentiality of the budget process,[22] but again the argument seems inconsistent with the facts of this case. As noted above, the Department of the Interior has already prepared a programmatic EIS discussing alternative levels of funding for the National Wildlife Refuge System, and the Government represented to the court below that the EIS satisfied all the demands of NEPA in the budget process. At no time did the Government contend below that its preparation of the programmatic EIS had run afoul of budgetary confidentiality considerations.

The Government's main contention with respect to confidentiality appears to be that an agency budget request cannot properly be disclosed until the President's budget is transmitted to Congress. Assuming *arguendo* that an agency has a legal right to maintain the secrecy of its budget request until the President's budget is transmitted,[23] it is readily demonstrable that Section

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supplemented or simply referred to, in following years. *Compare* A. Wildavsky, The Politics of the Budgetory Process 14-15 (2d ed. 1975) (budgets are largely incremental and many expenditures are not reviewed and remain unchanged from year to year) *with* Aluli v. Brown, 437 F. Supp. 602, 612 (D. Haw. 1977) (budget request EIS may simply be an "updated version").

[22] Brief of Petitioners at 29-30.

[23] The Government appears to rely upon the Budget and Accounting Act of 1921 as requiring confidentiality. In fact, however, neither that statute nor its legislative history provide any hint that budget preparation was intended to be cloaked in "confidentiality." The Act merely provides that the President submit the federal budget to Congress each year (31 U.S.C. § 11) and that budget requests not be submitted to Congress "by an officer or employee of any department or establishment, unless at the

102(2)(C) is compatible with that right and does not in fact require inappropriate disclosure. Specifically, a programmatic EIS of the kind contemplated by the decision of the Court of Appeals would normally address funding alternatives over a number of years and would be general in its terms rather than specific. Although it would provide valuable information for evaluating a particular request and alternatives, there is no reason why any specific budget request could not be reflected in the EIS as only one of several possible alternatives. The new CEQ regulations are consistent with this approach. They provide that a specific budget request need not be set forth in an EIS as the agency's preferred alternative if "another law prohibits the expres-

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request of either House of Congress." 31 U.S.C. § 15. Any requirement of confidentiality appears to result solely from guidelines and bulletins issued by OMB and its predecessors. But NEPA provides that any agency must interpret its authorizing statute in a fashion which is consistent with NEPA if at all possible. The Government has not demonstrated that the budget process would be incapacitated if agency budget requests to OMB were disclosed, assuming, *arguendo*, that NEPA requires such disclosure.

NWF and Defenders do not understand the Government to be arguing that application of NEPA to agency budget requests conflicts with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (*see* Brief of Petitioners at 50), nor could the Government so argue. Even if the FOIA were deemed an "authorizing statute" which, for purposes of Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976), could override NEPA in cases of unavoidable conflict, there is no possible conflict. The exceptions to disclosure provided in FOIA are permissive, not mandatory. *E.g.*, Pennzoil v. FPC, 534 F.2d 627 (5th Cir. 1976). Since the exceptions (if otherwise applicable at all) are only permissive and therefore do not bar disclosure, they cannot preclude disclosure of information the publication of which is required by another statute (including NEPA).

sion of such a preference." [24] Moreover, under the new CEQ regulations, if the budget request were treated as, or analogized to, a proposal for legislation, the EIS need not be made available to Congress or to the public until after the President's budget is submitted to Congress.[25]

The Government's brief also claims that disclosure of EIS's accompanying budget requests would "fragment the development of the presidential budget in a manner contrary to the intentions and requirements of the Budget and Accounting Act . . . ."; indeed, the brief makes the extraordinary assertion that such disclosure would lead to "the political fragmentation of the President's cabinet and Administration . . . ." [26] That thought, however, is hard to follow. The Budget and Accounting Act simply directed the President, with the assistance of a Bureau of the Budget (now supplanted by OMB), to coordinate agency budget requests and thus to centralize preparation of a national budget.[27] But the preparation of an EIS in aid of budget requests, as required by the decision below, does not pose any threat either to budget centralization or to any other requirement of the Budget and Accounting Act. Since the application of NEPA does not conflict with any statutory authority governing the budget process, the holding below is correct.

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[24] 43 Fed. Reg. 55996, promulgating 40 C.F.R. § 1502.14(e).

[25] *See* 43 Fed. Reg. 56001-02, promulgating 40 C.F.R. § 1506.8.

[26] Brief of Petitioners at 51.

[27] *See* H. Rep. No. 14, 67th Cong. 1st Sess., p.4 (1921) (details problems with pre-1921 budget procedures).

III. APPLICATION OF SECTION 102(2)(C) DOES NOT THREATEN, MUCH LESS INFRINGE, ANY EXECUTIVE BRANCH INTERESTS OF CONSTITUTIONAL DIMENSIONS

The Government contends that application of NEPA in the budget process would infringe on prerogatives that the Executive Branch enjoys under the Constitution. It is argued, for example, that requiring an EIS in connection with budget requests to be submitted to Congress "would risk breaching the separation of powers doctrine, and potentially infringing upon the President's constitutional power to present recommendations for legislation to the Congress." [28]

The argument is plainly without merit. Congress is entrusted with "All legislative Powers," [29] including the power to appropriate moneys [30] and to investigate

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[28] Brief of Petitioners at 31-33 n.22.

[29] Constitution, Article I, Section 1.

[30] Congress plainly has plenary powers in the budget process. The Constitution refers to appropriations twice, both in portions of Article I delineating Congress' legislative powers. In the exercise of its power to appropriate, Congress generally dealt directly with the agencies with regard to their budget requests until 1921. *See* L. Fisher, Presidential Spending Power 9-55 (1975). The Budget and Accounting Act, enacted to afford Congress a more coordinated set of agency proposals with which to deal, was not viewed by Congress as diminishing or denying its power over appropriations. *See* H. Rep. No. 14, 67th Cong., 1st Sess. p. 7 (1921). Congress understands itself to have preeminent power with regard to appropriations. As stated by the House Government Operations Committee,

> "Budget-making, a Presidential responsibility, is prescribed by law, not by any inherent right of office. . . . The concept [is] that the budget should be a tool of congressional funding decisions and spending controls. The President was given a statutory requirement to provide the Congress with a budget, and the Bureau of the Budget was given a statutory

and to obtain such information as may be necessary to exercise the power to legislate (and appropriate) in an intelligent fashion.[31] Similarly, Congress can unquestionably require the Executive Branch to assemble and disclose (*e.g.*, in an EIS) any and all information supporting—or not supporting—a "recommendation" of the Executive Branch to Congress.[32]

It is also urged that requiring agencies to submit EIS's with their budget requests poses possible "constitutional difficulties" under the Opinion Clause, which provides that "the President . . . may require the Opinion . . . of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ." [33] But requiring agencies to consider certain kinds of information in reaching decisions, or even to give more or less weight to

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responsibility to assist in its preparation. This chain of requirements puts the Bureau firmly at the service of Congress, an obligation which has been honored for half a century. . . ." H. Rep. 93-697, 93d Cong., 1st Sess. pp. 2&6 (1973).

[31] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975). ("the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.' McGrain v. Daugherty, 273 U.S. 135, 175 (1927)").

[32] The Government's argument that constitutional problems are posed by EIS's in the budget context is belied by the fact that EIS's are required on legislative proposals (43 Fed. Reg. 56001, promulgating 40 C.F.R. § 1506.8), and the Government does not appear to dispute this requirement. Budget requests, at least for the purposes involved here, are not distinguishable from legislative proposals.

[33] Brief of Petitioners at 32, citing Constitution, Article II, Section 2, Clause 1.

certain factors, is hardly an infraction of the Opinion Clause. Clearly, Section 102(2)(C), which only establishes a procedure for ensuring that agencies consider certain factors in formulating their "opinions" or proposals,[34] does not infringe on the Opinion Clause. Under this Section, once those factors have been brought to the agencies' attention, the agencies are free to form any opinions they want. It is nothing short of ludicrous to suggest that NEPA unconstitutionally interferes with the formulation and communication of opinions within the Executive Branch.[35]

Finally, the Government claims that constitutional questions would arise "*if* Congress were to enact legislation restricting the President's ability to exercise his discretionary political judgment in the preparation of the presidential Budget." [36] That may or may not be so, but NEPA is certainly not such a piece of legislation. Again, NEPA does not "restrict" the President's ability to exercise his political judgment; it only establishes a procedure to require agency consideration of the environmental consequences of their acts. Since NEPA itself does not preclude the President or an agency from acting in contravention of environ-

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[34] TVA v. Hill, 437 U.S. 153, 188 n.34 (1978).

[35] The Government may have intended to suggest that NEPA obligations might delay an agency in forwarding its "opinion" to the President, thus infringing on the Opinion Clause. But this concern would appear equally applicable to "opinion" on legislation, about which the Government does not suggest constitutional concerns. Moreover, CEQ has not had difficulty in providing for expedited procedures relating to EIS's in the legislative context. And more importantly, an agency may provide its "opinion" to the President quite freely. It must comply with NEPA only in the context of a report or recommendation on a proposal for legislation or major Federal action.

[36] Brief of Petitioners at 50 (emphasis added).

mental concerns, it plainly does not restrict the exercise of Presidential judgment in any way at all.

The simple fact is that the Government has gone to extraordinary lengths to conjure up constitutional objections to the decision below and has totally failed in the endeavor.

CONCLUSION

The decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

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